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2005 LAND USE LAW UPDATE

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NEW STATUTES OF INTEREST

SOME REAL BITE ADDED TO LAND USE ENFORCEMENT POWERS

By the adoption of HB 713 (Chapter 242 of the Laws of 2004, effective January 1, 2005), the legislature put some real "bite" into the powers municipalities have to enforce land use regulations.

First, under RSA 676:17 (the "generic" enforcement statute that allows the municipality to bring land use enforcement actions in either the superior or district courts), the daily penalty has been doubled from $275 to $550 for a **subsequent offense**; the daily fine remains $275 for a **first offense**.

What a Difference a Word Makes!

Far more important than the increased fine for subsequent offenses, is the change of the word "may" to "shall" in RSA 676:17, II. The prior version of the statute said that in an enforcement action, the municipality "**may**" recover its costs and reasonable attorney's fees in pursuing the enforcement action if the municipality is found to be a prevailing party – in the vast majority of enforcement actions, the court would not award the town its attorney's fees, because the general rule in the United States is that each party bears its own fees, unless the losing party has engaged in egregious behavior that convinces the court that the award of attorney's fees is a justifiable response. However, the amended statute now requires that the municipality "**shall**" recover such costs and attorney's fees if it is a prevailing party. That is a huge shift in the dynamics of land use enforcement, and I think it will have a very powerful, positive effect on the ability of municipalities to achieve "voluntary" compliance with land use regulations once the word gets around that if the violator loses in court he or she **will be** required to pay the town's costs and attorney's fees.

By the way, the town's recoverable costs (in addition to attorney's fees) are defined as "all out-of-pocket expenses actually incurred, including but not limited to, inspection fees, expert fees and investigatory expenses."

Finally, keep in mind that RSA 676:17 has a very broad application, in that it may be used to enforce any of the provisions of state enabling legislation, or any local ordinance, code, or regulation adopted under the state enabling legislation, or any provision or specification of any application, plat, or plan approved by, or any requirement or condition of a permit or decision issued by, any local administrator or land use board acting under the authority of the state's land use laws.

IMPACT FEES, SITE-SPECIFIC EXACTIONS, VESTING OF DEVELOPMENT RIGHTS, AND WAIVER OF SUBDIVISION REGULATIONS

Whew! SB 414 (Chapter 199 of the Laws of 2004, most of which became effective June 7, 2004) was a sort of a "Christmas Tree" piece of legislation that affected several

different and important areas of land use law. Let's describe the separate changes, as follows:

1. Legislature Adjusts Relationship Between Impact Fees & Vested Rights Statute

As background, recall that in R. J. Moreau Companies, Inc. v. Town of Litchfield, 149 N.H. 312 (2002) the court ruled that the vested rights statute, RSA 674:39, protected developments from impact fee ordinances, and even increases in fees that were already on the books as part of an impact fee ordinance when the development was approved! In Moreau, the supreme court rejected the town's argument that the protection afforded by the statute should be limited to changes to land use ordinances (or entirely new ordinances) that have the effect of **prohibiting completion** of the development in accordance with the approved plans -- impact fees do not prohibit a project's completion but are merely additional costs imposed on a developer. Instead, the court ruled flatly that "RSA 674:39 plainly encompasses all zoning ordinances, whether or not they will have the effect or purpose of stopping an approved project. If the legislature had wanted to exempt impact fees from the reach of RSA 674:39 (as it did for ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements) **it could have included them in the statutory exceptions**." (emphasis added.)

Well, the legislature took up the court's invitation and amended RSA 674:39 by the passage of Chapter 199 (SB 414) in the 2004 session – the result has been advertised as reversing the court's decision in Moreau, so that the amended statute expressly subjects developments (subdivision or site plan approvals) to new impact fees, or changes in existing impact fee ordinances, that are enacted after the project is approved by the planning board.

However, when one actually reads the text of the amendment, the way the new statute has been described **IS SIMPLY NOT ACCURATE!!**

What the legislature actually did is:

(a) amend the first paragraph of RSA 674:39 to make the statute **AGREE** with the Moreau decision, by stating that every approved and recorded subdivision or site plan **shall be exempt from new impact fee ordinances, or from increases in the amount of impact fees,** for 4 years, provided active and substantial development or building begins on the site within 12 months of the date of approval;

(b) amend the second paragraph of RSA 674:39 to state that once substantial completion of the improvements shown on the subdivision plat or site plan has occurred, the project will lose the protection inserted into the first paragraph and then **BE SUBJECT TO** new impact fee ordinances, or changes to pre-existing impact fees!!

Indeed, it seems to me that the new law turns the common law on its head, in the sense that developments are protected from new or increased impact fees during the period when developments would normally be subject to them at common law, and are made subject to the new or increased impact fees after the developments would, in many cases, have become vested against zoning changes at common law. It therefore seems to me that the amendment to paragraph II of RSA 674:39 might be struck down as unconstitutional, at least as applied in a particular case where enough work has been done to vest the development against changes in land use regulations at common law. Time will tell, perhaps.

2. Amendments Regarding Impact Fees & "Exactions"

Section 2 and 3 of SB 414 make changes to RSA 674:21 regarding impact fees, and "exactions," as follows:

(a) RSA 674:21, V(d) was rewritten (but the change is not effective until June 1, 2005) to alter the way impact fees are assessed and collected; the changes are:

1. all impact fees are now assessed at the time the planning board approves a subdivision or site plan (prior version: fees are assessed prior to, or as a condition for, the issuance of a building permit "or other appropriate permission to proceed with development");

2. where no planning board approval is required, or has been granted prior to the adoption or amendment of the impact fee ordinance, impact fees shall be assessed prior to, or as a condition for, the issuance of a building permit "or other appropriate permission to proceed with development" (new provision);

3. impact fees shall be intended to reflect the effect of development upon municipal facilities at the time of the issuance of the building permit (new provision);

PRACTICE POINTER: This provision (No. 3 above) is a sleeper, in the sense that it seems to add to the substance of what an impact fee is, and should have been inserted into the introductory text of paragraph V of RSA 674:21 where the definition of impact fee is found, rather than in subparagraph V(d) which, before the amendment, merely addressed the mechanics of assessment and collection. Time will tell if this new statement hidden away in V(d) has any practical effect on the definition of impact fees as interpreted by the courts.

4. impact fees shall be collected at the time a certificate of occupancy is issued; if no CO is required in the town, impact fees shall be collected when the development is ready for its intended use (prior version: impact fees shall "normally" be collected as a condition for the issuance of a CO);

5. the municipality and the assessed party may agree on an alternate, mutually acceptable schedule of payment of impact fees in effect at the time of subdivision or site

plan approval by the planning board. If such an alternate schedule of payments is established, municipalities may require the developer to post a bond or otherwise provide "suitable measures of security" to guarantee future payment of the impact fees (similar to prior version, but rewritten to be clearer).

(b) Effective June 7, 2004 a new section was inserted into the statute, RSA 674:21, V(j), which declares that the failure to adopt an impact fee ordinance **shall not** preclude a municipality from requiring developers to pay an "exaction" for the cost of off-site improvements determined by the planning board to be necessary for the occupancy of any portion of the development. This new statute reverses (finally!) the court's decision in Simonsen v. Town of Derry, 145 N.H. 382 (2000), in which the court misunderstood RSA 674:21, V(i) and held that municipalities must first have an impact fee ordinance before requiring an "exaction" for off-site improvements. (In the years since the Simonsen case was wrongly decided, many towns adopted a "stripped down" version of an impact fee ordinance that would comply with the Simonsen mandate for off-site exactions; planning boards in other towns were often able to convince the developer to "voluntarily" pay for off-site improvements, to avoid having the planning board deny the application as scattered or premature.)

"Off-site improvements" are defined as those improvements necessitated by a development which are located outside the boundaries of the subdivision plat or site plan, but limited to "any necessary highway, drainage, and sewer and water upgrades pertinent to that development."

The new subparagraph goes on to include a statement of the familiar "rational nexus" test fashioned by the courts:

> "The amount of any such exaction shall be a proportional share of municipal improvement costs not previously assessed against other developments, which is necessitated by the development, and which is reasonably related to the benefits accruing to the development from the improvements financed by the exaction."

The statute also includes the following points:

1. as an alternative to paying an exaction, the developer may elect to construct the necessary improvements, subject to bonding and timing conditions as may be reasonably required by the planning board;

2. any exaction shall be assessed at the time of planning board approval of the development;

3. if the calculation of the exaction is predicated on some portion of the cost being paid by the town, a refund of any exaction collected from the developer shall be given if the local legislative body (town meeting) to appropriate the town's share of the cost within 6 years from the date of collection.

PRACTICE POINTER: With the insertion of RSA 674:21, V(j) into the law, the legislature has firmly drawn the line between two "flavors" of impact fees that I used to call "generic impact fees" and "site-specific impact fees," and which are now referred to in statute as "impact fees" and "exactions."

The first flavor, that I used to call "generic impact fees," are those fees that are assessed, usually against residential dwelling units, to help defer the costs of the infrastructure needs of the community that are required by residential growth as a general matter, needs such as water and sewage treatment facilities, schools, solid waste disposal, libraries, public recreational facilities, and so forth (as set out in RSA 674:21, V) – these are not fees to pay for public infrastructure specifically made necessary by a particular development. To adopt and administer an impact fee ordinance requires a major effort on the part of those involved in local land use matters. A difficult task is to set the amount of the impact fee in a manner that reflects new developments' fair share of the cost of anticipated (or already constructed) public infrastructure – a significant amount of work by both citizens and professional consultants is necessary to craft an impact fee ordinance and associated fee structure that will survive a legal challenge.

The other flavor of development fees, which the legislature has now called "exactions," are fees for the cost of off-site improvements that are, at least to some degree, specifically made necessary by, and which will specially benefit, a particular development application that is under consideration by the planning board. It is a much simpler task, although not without some complications, to determine what off-site improvements are required, and how much of the burden should be laid on the specific developer.

3. Planning Boards May Waive Subdivision Requirements, Finally (If the Subdivision Regulations Say So)!

Section 4 of SB 414 inserts a new subparagraph (m) in RSA 674:36, II which allows, but does not require, the planning board to insert a waiver provision in its subdivision regulations – effective June 7, 2004 the subdivision regulations may provide

> "for waiver of any portion of the regulations in such cases where, in the opinion of the planning board, strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations."

For some strange reason, the statute that controls the content of the planning board's site plan regulations, RSA 674:44, has for many years **required** that the board's regulations contain the waiver language that the planning board is now **allowed** to insert in the subdivision regulations – see RSA 674:44, III (e). H-mmmmmm.

PRACTICE POINTERS: Three things. First, some planning boards did place waiver language in their subdivision regulations before the recent statutory amendment

specifically allowed for it. Every planning board that already has waiver language should review it to be sure it is compliant with the new law, and amend it if the old waiver language differs in any substantial way from the new law.

Second, be aware that although the legislature has used the phrase "unnecessary hardship" as the standard to determine when the grant of a wavier may be appropriate, both in the site plan, and now the subdivision, enabling legislation, we have no reason to think that this is the same "unnecessary hardship" test that applies to the grant of a variance. Instead, this type of "unnecessary hardship" is probably more like "practical difficulty," meaning that there must be a really good reason why the part of the regulations that are waived will pose a difficult obstacle to the project with little, if any, public benefit (so that a waiver will not violate the sprit and intent of the regulations).

Third, there are probably planning boards that occasionally granted a waiver from subdivision regulations even without having any language to allow that in their regulations. Especially with the enactment of the new RSA 674:36, II (m) it is quite important that the waiver enabling language be inserted into the subdivision regulations (see RSA 675:6 for the simple procedures which must be followed to adopt or amend subdivision or site plan regulations). <u>If the waiver language is not inserted into the regulations, the court may well conclude that the planning board had no power to grant any such waiver</u>.

LEGISLATURE DEFINES "WETLANDS," EVEN FOR LOCAL LAND USE REGULATION, BUT INCLUDES "OPT OUT" LANGUAGE

Chapter 243 of the Laws of 2004 (HB 1148) does a couple of important things. First, it inserts a definition of "wetlands" as RSA 482-A:2, X (effective July 1, 2004) in the law that governs Fill & Dredge in Wetlands. "Wetlands" are defined as:

> "an area that is inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support, and that under normal conditions does support, a prevalence of vegetation typically adapted for life in saturated soil conditions."

Second, a new section is inserted (which is effective a year later than the above definition, on July 1, 2005) as RSA 674:55 (smack in the middle of the enabling legislation that underpins all local land use regulatory authority) that:

1. requires that whenever the term "wetlands" (whether singular or plural), is used in local land use regulations, the term shall be given the meaning in RSA 482-A:2, X;

2. states that <u>delineation of wetlands</u> for purposes of local land use regulations shall be as mandated by DES in administrative rules adopted under RSA 482-A;

3. the new section goes on to state the following, which seems to allow municipalities to adopt a different definition of wetlands, and different methods of

delineating wetlands, from the definition and delineation rules mandated under the new law:

> Nothing in this subdivision shall be construed to limit the powers otherwise granted under this chapter for municipalities to plan land use and enact regulations based on consideration of environmental characteristics, vegetation, wildlife habit, open space, drainage, potential for flooding, and protection of natural resources, including critical or sensitive areas or resources and groundwater. In the context of such authority, municipalities may define and delineate resources or environmental characteristics, such as wet soils or areas, and shoreline or buffer areas, in a manner different from the common meaning and delineation of wetlands required herein.

NEW HAMPSHIRE SUPREME COURT OPINIONS

THE NEW "AREA" VARIANCE HARDSHIP TEST

On May 25, 2004 the New Hampshire Supreme Court released its decision in the case of Boccia v. City of Portsmouth, 151 N.H. 85. The court announced that ZBAs must now apply a different set of criteria to decide whether "unnecessary hardship" is present when an applicant seeks an "area" variance, in contrast to the Simplex standards which apply when a "use" variance is sought.

Sadly, the court's decision that we must have a different hardship standard for area variances is an act of pure social engineering that should have been left to the legislature. That is, the existence of a different test for area variances is not required by any constitutional principles that would have justified the court's meddling; rather, the court was quite frank in stating in Boccia that the justification for the new standard is simply that "we believe that distinguishing between use and area variances will greatly assist zoning authorities and courts in determining whether the unnecessary hardship standard is met." Ha! Thanks for all your help!

1. What is an "Area" or "Nonuse" Variance?

The court describes it this way:

> A nonuse variance authorizes deviations from restrictions which relate to a permitted use, rather than limitations on the use itself, that is, restrictions on the bulk of buildings, or relating to their height, size, and extent of lot coverage, or minimum habitable area therein, or on the placement of buildings and structures on the lot with respect to the required yards. Variances made necessary by the physical characteristics of the lot itself are nonuse variances of a kind commonly termed "area variances."

2. Factors of the New "Unnecessary Hardship" Test for Area Variances

The court announced the following two general factors that must be used to evaluate whether "unnecessary hardship" exists that will enable a ZBA to grant an area variance:

First Factor:	Whether the variance is necessary to enable the applicant's proposed use given the special conditions of the property.
Second Factor:	Whether the benefit sought by the applicant can be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.

Let's look at each factor in more detail.

First Factor

Under the first factor, the landowner need not show that without the variance, the land will be without value.

In other words, assuming that special conditions of the property make it difficult or impossible to comply with applicable setbacks or other restrictions, then an area variance might be necessary from a practical perspective to implement the proposed plan. Clearly, this factor is much more relaxed than the pre-Simplex hardship standard which required an applicant to prove that without the variance, the restrictions contained in the zoning ordinance prevented all reasonable use of the property. It is also much more relaxed than even the easier hardship standards announced in the Simplex case, which still apply to "use" variances.

Under this first factor, the court has resurrected the old "unique conditions" requirement that was part of the hardship test before the Simplex case changed the rules for all variances in January, 2001. That is, the applicant for an area variance must show that the hardship is the result of unique conditions of the property which are not generally shared by lots in the area. Theoretically, this means that an applicant whose property shares dimensional challenges common to other lots in the area will not be able to meet the hardship test, because the conditions that are causing the problem are in no way "unique" or even "special" to the applicant's lot. However, the court had no problem ignoring this issue under the pre-Simplex cases when it suited the court to do so, and I suspect that this will be true of cases decided under the new area variance test.

Second Factor

This factor examines whether there is a reasonably feasible method or methods of effectuating the proposed use without the need for the variance. If the answer is "no," then the applicant has met the second part of the new test.

> **Note:** There is no language in the Boccia case to suggest that the applicant has any obligation to scale back the proposed use so that an area variance might not be required at all, or so that a lesser violation of the area requirements of the zoning ordinance would result. This seems hard to believe, but until the court says otherwise, applicants will surely argue that the ZBA must deal with the merits of the proposal as advanced by the applicant. The applicant will insist that the ZBA is not allowed to say: "Hey, you could put an 60-unit hotel on your property without any area variances, so you're not entitled to a variance to cram a 100-unit hotel onto the same space!" (See the report of the case of Vigeant v. Town of Hudson, below, in which our worst fears on this point appear to have materialized.)

The court said that under this second factor, the ZBA must also consider whether the area variance is required to avoid an undue financial burden on the landowner. However, the landowner need not show that without the variance the land will be

rendered valueless or incapable of producing a reasonable return. Instead, the ZBA must examine the financial burden on the landowner, including the relative expense of available alternatives. We have no guidance from the court as to when the financial burden is heavy enough to tip the scales in favor of the applicant.

The court referred to the recent case of Bacon v. Town of Enfield, 150 N.H. 468 (2004) as an example of where the applicant would not be able to meet this second factor. In Bacon, the applicant sought a variance to attach a shed on the exterior of her home for a propane furnace. The shed would violate the shorefront setback requirement in the zoning ordinance. Because the evidence showed that the applicant could have located the furnace inside the existing garage or attic at reasonable expense, she would not have been able to meet the second factor of the new area variance hardship test, because there were reasonably feasible method or methods of effectuating the proposed use without the need for the variance.

3. Do the Other Four Elements of the Variance Criteria Apply?

Absolutely. If there is one thing that is clear, it is that the new test applies only to the question of whether there is "unnecessary hardship" present to allow an area variance to be granted. The applicant must still meet the other four variance criteria, which remain the same for both "use" and "area" variances, as follows:

- & the variance will not be contrary to the public interest
- & the variance is consistent with the spirit of the ordinance
- & granting the variance will do substantial justice
- & granting the variance will not diminish the value of surrounding properties

JUST WHEN YOU THINK IT CAN'T GET ANY WORSE, IT DOES!

Vigeant v. Town of Hudson (February 23, 2005)

In this important follow-on case to Boccia v. City of Portsmouth, the decision which established the separate test for unnecessary hardship for area variances, the court seems to have virtually slammed the door on the municipality's ability to enforce density requirements, or other dimensional features important to the overall zoning scheme. Here are the facts:

In October 2002, the plaintiff filed an application with the ZBA for an area variance for a five-unit multifamily dwelling, with the individual units connected either by a garage or a screened porch. The property is zoned as a Business District. Multifamily dwellings, defined in the town's zoning ordinance as three or more attached dwelling units, are a permitted use in a Business District. The parcel of land is a long, narrow, mostly rectangular lot approximately 770 feet long by 129 feet wide at its widest end,

constituting about 1.6 acres. The land is bounded along its southerly boundary by Route 111 and along its northerly and easterly boundaries by Windham Road. The zoning ordinance requires a fifty-foot setback from Windham Road and a fifteen-foot setback from Route 111. However, an area of wetlands is present along the southerly boundary, which was created by drainage from Route 111 and failure to maintain the drainage ditch. Because the zoning ordinance requires a fifty-foot setback from wetlands, the setback from Route 111 is actually fifty feet instead of fifteen feet. The plaintiff applied for a variance from the fifty-foot setback to allow construction to extend to within thirty feet of Windham Road and for a special exception to permit a temporary encroachment of ten feet into the wetlands buffer zone during construction. On February 13, 2003, a public hearing was held on the plaintiff's application. The ZBA voted unanimously to deny the request for a variance on grounds that the application was not consistent with the spirit of the ordinance, that there was no evidence of hardship, that there would be a diminution of surrounding property values and that it would be contrary to the public interest. The ZBA also voted unanimously to deny the request for a wetlands special exception. The ZBA denied the motion for rehearing and the plaintiff appealed to superior court.

The superior court reversed the ZBA's denial of the variance, applying the unnecessary hardship test under Simplex Technologies v. Town of Newington, 145 N.H. 727 (2001) (because the Boccia v. City of Portsmouth case had not yet been decided.) The superior court found that the lot is unique, not just in its setting, but in its very character and description. In finding that the landowner had satisfied the unnecessary hardship standard as announced in Simplex, the court stated: "It would be difficult to envision any reasonable permitted use which could be made of this parcel of real estate. Any reasonable permitted use of this real estate would probably require at least similar relief from the setback requirements." The also superior court went on to rule that there was no evidence in the record to support the ZBA's denial of the variance on any of the other non-hardship elements of the 5-part test.

On appeal to the NH Supreme Court, both parties requested guidance in applying the Boccia unnecessary hardship factors to the area variance in question. In a nutshell, the guidance the court gave (sometimes it is better not to ask!) is as follows: If the use is permitted under the ordinance, it is presumed to be reasonable; then, if an area variance is needed to enable the permitted use to be established, it must be granted. Here's the detail of the guidance the court gave Hudson, and every other municipality:

First *Boccia* Factor

As to the first factor, whether an area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property, the town questioned whether the reasonableness of the proposed use is to be taken into account.

The court held that it is implicit under the first factor of the Boccia test that the proposed use must be reasonable. However, when an area variance is sought, the

proposed project is presumed to be reasonable if it is a permitted use under the town's applicable zoning ordinance. Under the Hudson zoning ordinance, it is permissible for the plaintiff to build five units of multifamily housing on his property. Other permissible uses in a Business District under the zoning ordinance include, for example, an automotive service and repair station, a laundromat, a retail establishment, a funeral home or a warehouse. The plaintiff determined, however, that multifamily housing was, of the permitted uses, the most appropriate for the neighborhood. If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property. Given that the proposed use in this case is permitted and thus presumptively reasonable, the issue is whether the plaintiff has shown that to build five multifamily dwelling units it is necessary to obtain a setback variance, given the property's unique setting in its environment.

Second *Boccia* Factor - the Bomb is Dropped

As to the second factor, whether the benefit sought by the applicant can be achieved by some method reasonably feasible for the applicant to pursue, other than an area variance, the plaintiff questioned whether the ZBA can require an applicant to agree to a different variance or accept an alternative use for the property, such as building fewer units of multifamily housing than what the applicant is proposing.

In reply, the court said that under the second factor of the Boccia test, there must be no reasonable way for the applicant to achieve what has been determined to be a reasonable use without a variance. In making this determination, the financial burden on the landowner considering the relative expense of available alternatives must be considered. The Hudson ZBA focused upon whether an alternative use of fewer dwelling units was more suitable. **In the context of an area variance, however, the question whether the property can be used differently from what the applicant has proposed is not material.**

Well, there it is!! To those of us who were wondering after Boccia whether an applicant for an area variance had any obligation to scale back the intensity of the proposed use, to eliminate the need for the area variance, or so that not so great a departure from the dimensional rules would be required, the court has firmly replied: “Not on your life!”

It is really hard to accept the way the court has set up the rules for “unnecessary hardship” for area variances. It seems that, at least so long as the use is permitted under the zoning ordinance, under the supreme court’s formulation the applicant will almost always be able to qualify for whatever area variances are necessary to shoehorn the use onto the particular lot, with no requirement that the intensity of the proposed use be scaled back so that the dimensional requirements can be met, or more nearly met. Thus, at this stage of the development of the law, it is feared that the dimensional requirements of zoning ordinances, including density, may have been rendered meaningless by the court.

Will We Be Saved by the Legislature?!

Unlikely though it may seem, we may be rescued by the legislature. As I write this (March 28, 2005), there is a bill (HB 359) that will soon come to the floor of the House from the Municipal & County Government Committee that may restore some sanity to the "unnecessary hardship" element of variance law. There is some hope that the legislature will eliminate the new distinction between use and area variances, and truly simply the standard for "unnecessary hardship," which the court has said was one of its goals! Let us hope so!

PRACTICE POINTER: With the state of the new variance law (for both use and area variances) so unsettled (and likely to remain so for years unless the Legislature comes to the rescue!) it is more important than ever for ZBAs to rely on more than just whichever of the two "unnecessary hardship" tests applies to the particular case when denying a variance application. This is true because if the court agrees that the applicant has failed to meet any one of the five elements, the ZBA's denial will be upheld. You may well have a case where an applicant who wishes to shoehorn a proposed use onto a lot in violation of area requirements will not be able to meet one or more of the other four variance tests, even if it seems that the applicant does meet the relaxed test for "unnecessary hardship." If you deny the application based only on the hardship test, and the court finds that the applicant meets that test, the court will likely order the variance to be issued even though the applicant might have failed one or more of the other tests if the ZBA had bothered to address them!

THE "USE" VARIANCE HARDSHIP TEST

In the case of Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001) the New Hampshire Supreme Court threw out several decades of case law that had defined the circumstances that must be present for an applicant to meet the "unnecessary hardship" test for a variance. Convinced that the test for "unnecessary hardship" had become so restrictive that almost no applicant could meet it, the court articulated a new, more relaxed standard.

Simplex was followed a couple of years later by the case of Rancourt v. City of Manchester, 149 N.H. 51 (2003). In Rancourt, a unanimous court seems to have applied the new test in a fairly straightforward manner, upholding the grant of a variance which allowed the landowners to stable two horses on their property in a zoning district where such livestock is prohibited.

But then, early in 2004 the court decided the case of Bacon v. Town of Enfield, 150 N.H. 468, and it appeared that the Simplex train jumped the tracks! The Chief Justice wrote the majority opinion, ruling that granting the particular variance would be contrary to the spirit of the Enfield Zoning Ordinance (one of the other four variance tests that must be met in addition to the hardship test), and that is the basis upon which the case was ultimately decided (although the two justices who concurred did not share the Chief's reasoning!). More importantly, four of the justices (two on each side) got into a

quarrel about how the first prong of the Simplex hardship test is defined and how it should be applied to variance cases. With two justices on each side of the quarrel, this critical issue could not be resolved by the court, being left for decision in a future case. As we now know, that future case was Boccia v. City of Portsmouth, 151 N.H. 85 (2004), which gave us the new, separate definition of "unnecessary hardship" for area variances, as described at the beginning of the case law section of these materials.

In an effort to shed some light on the current state of the law regarding "unnecessary hardship" as it applies to use variances, you will find the following in this section of the materials:

(1) my original write-up of the Simplex decision as presented in earlier editions of these materials;

(2) my original write-up of the Rancourt decision;

(3) my original write-up of a variance decision that was issued a few months after Simplex, Hill v. Town of Chester, 146 N.H. 291 (2001). The Hill case concerns itself with self-created hardship and how that issue will be treated under the new Simplex standard.

SUPREME COURT CREATES NEW TESTS TO DETERMINE WHETHER "UNNECESSARY HARDSHIP" EXISTS TO JUSTIFY GRANT OF VARIANCE!!

Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001)

In this case, the supreme court has radically changed the legal definition of what constitutes the "unnecessary hardship" that must be found to allow the Zoning Board of Adjustment to grant a variance from a zoning ordinance. The other four variance criteria remain nominally unaffected by the decision, although some elements of each of those other criteria seem to be inherently part of the analysis ZBAs will have to undergo as they apply the new hardship tests.

For decades, for unnecessary hardship to exist, the applicant for a variance in New Hampshire had to show that unless the variance were granted, there would be no reasonable use of the property allowed under the zoning ordinance. Now, the supreme court has decided to substitute a more relaxed test, effective immediately.

The new test for "unnecessary hardship" consists of 3 elements, and the applicant must meet each one. For "unnecessary hardship" to exist, the applicant must show:

(1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment;

(2) that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

(3) that the variance would not injure the public or private rights of others.

Let's look at each of these elements.

I. REASONABLE USE

A. General Approach

(1) the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment (emphasis added).

Under this element, the ZBA must consider the special circumstances of the particular parcel of land for which the variance is sought. It requires the applicant to show that the zoning restriction interferes with his or her "reasonable use" of the property. However, the ZBA must make that judgment, not in a vacuum, but considering the unique setting of the property in its environment.

Put another way, whether the proposed use of the property is reasonable depends to a large degree on the setting that surrounds the property. For example, if an applicant is seeking a use variance to allow a pig farm in a residential neighborhood, the ZBA may well conclude that the proposed use of the property is not reasonable considering the unique setting of the property in its environment. In such a case, the ZBA would therefore find that the zoning restriction (that prohibits pig farms in the zone) does not interfere with the reasonable use of the property, considering the unique setting of the property in its environment.

B. Must There Still Be Some Unique Characteristic of the Land That Distinguishes it from Other Parcels in the Area?

As background, recall that in the first place the statute that authorizes the ZBA to issue variances, RSA 674:33, I states that there must be "special conditions" which will result in "unnecessary hardship" if the restriction in the zoning ordinance is enforced against the property. Over many years of deciding variance cases, the supreme court took this "special conditions" requirement, transformed it into a rule that required an applicant for a variance to show that the property has a "unique" physical problem, and added the further hurdle that the effect of the unique condition of the land coupled with the zoning restriction at issue must be to eliminate all reasonable use of the property.

As Justice Souter wrote in his last New Hampshire Supreme Court opinion, an applicant for a variance must show that there is "some unique condition of the parcel of land distinguishing it from others in the area [which] bar[s] any reasonable use of the

land consistent with literal enforcement of the ordinance." Crossley v. Town of Pelham, 133 N.H. 215, 216 (1990).

In my view, the courts have been somewhat disingenuous about the requirement that there be some "unique" characteristic that underlies the unnecessary hardship. By this I mean that when it suited the court to trot out the "unique" requirement aspect, as in the Crossley v. Town of Pelham case, it would do so. This would typically occur when the zoning restriction at issue did not cause the loss of all reasonable use of the property anyway, so the court could safely recite the platitude about "uniqueness" almost as an aside ("By the way, many of the other properties in the area have the same problem the applicant's land has, so there's no "unique" condition that would justify the grant of the variance," the court would say in such a case).

On the other hand, when the zoning restriction really did cause the loss of all reasonable use of the property, the court would not waste any time examining whether there was a "unique" characteristic of the lot not shared by others in the area. For example, if a large number of small, non-unique waterfront lots would have trouble complying with the shorefront setback requirements, the court focused only on the "reasonable use" element, not on whether there was some problem unique to the particular lot at issue (because the problem was by no stretch of the imagination unique). See, e.g., Husnander v. Town of Barnstead, 139 N.H. 476 (1995).

I believe the first part of the new variance hardship test has, thankfully, done away with the sham that the applicant must show some "unique" physical condition of the parcel (keep in mind that "unique" is a pretty powerful word which requires an absolute, unmodified state, in spite of the manner in which the word is now routinely misused in speech and informal writing). I say this because of the background described above, and because of the plain language of the first part of the test, repeated here:

> (1) that the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment; (emphasis added.)

This language focuses the ZBA's inquiry on the setting of the property, and declares it to **BE** "unique" as a matter of definition. There is justification for this, in the common notion that every property in its setting really is "unique" – there is no other parcel in the world in that setting, surrounded by those other properties that have those other characteristics.

So I believe that in this first part of the test the supreme court is telling us to examine whether the applicant's proposed use of the property (which is prevented by the zoning restriction at issue) is "reasonable" in light of the unique setting of that parcel, which will include inquiry into the nature of any existing uses in the surrounding neighborhood. I believe the requirement that the applicant show that there is some "unique" condition of the parcel that no other parcel shares has been assigned to the

judicial dust bin, where it belongs. Only time will tell as variance cases are decided under the new hardship tests![1]

II. FAIR AND SUBSTANTIAL RELATIONSHIP

(2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property

This element requires the ZBA to identify, in the abstract, the general purpose(s) of the zoning restriction for which the variance is sought. Why does the restriction exist in the first place? What purpose is it intended to achieve? Yes, it is true that the plain language of this test requires the ZBA to identify the general purposes of the entire zoning ordinance and then judge whether those purposes are advanced by the specific restriction in the ordinance that is causing the problem. However, I think this test may be more limited than the language suggests. I would argue that the more logical application of this test requires the ZBA to first identify the general purposes sought to be achieved by the specific restriction (not by the ordinance as a whole, which, of course, will have a host of general purposes, some of which may have little relationship to the specific restriction for which the landowner is seeking the variance).

Next, the ZBA should look at whether those general, abstract purposes are advanced when the zoning restriction is applied to the particular piece of property for which the variance is sought -- this "*as applied*" inquiry must also take into account the unique setting of the property in its environment, just like the first element of the hardship test.

Continuing the pig farm example, the general purpose of restricting a zone to residential use is to separate residential areas from non-residential uses that are deemed incompatible, and then to preserve the residential character of the zone once it is established. In most cases, it would be very difficult for an applicant who sought a variance to allow the pig farm to show that there is no fair and substantial relationship between the general purpose of allowing only residential uses in that zone, and the impact of that restriction on the applicant's specific property. That is so because in the "typical" case the restriction has exactly its intended effect when it is applied to the applicant's property: it preserves the integrity of an existing residential zone from the impact of incompatible, non-residential uses.

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[1]As I am revising these materials for presentation at the 2005 Annual Planning & Zoning Conference, I am sorry to say that my original optimism about this point seems to have been unjustified. It is clear that under the first prong of the court's new "unnecessary hardship" standard for **area** variances, the notion that there must be unique characteristics of the parcel **not shared by others in the area** has been resurrected. I therefore expect that we will see the court clarify that issue for **use** variances in the foreseeable future. As in the past under the "old" variance law, I expect the court will pay lip service to the "uniqueness" characteristic when it can get away with it, and ignore the "uniqueness" requirement when the features of the lot that cause the problem are shared generally by others in the area.

However, one can imagine a situation where there are a number of other farming uses in the neighborhood that are either "grandfathered," or were established as a result of earlier variances that were issued, so that there is already a strong presence of similar agricultural uses in the area where the applicant wishes to establish the pig farm. In such a case, the applicant may be able to show that there is no "fair and substantial" relationship between the general purpose of the zoning restriction that allows only residential uses, and the impact that restriction has on the applicant's property.

III. NO INJURY TO PUBLIC OR PRIVATE RIGHTS OF OTHERS

(3) the variance would not injure the public or private rights of others

This third and final element of the new hardship test requires the applicant to show that the proposal would not injure the public or private rights of others. This encompasses part of one of the four other parts of the variance test that requires the applicant to show that no diminution of surrounding *property values* will result from the grant of the variance. However, the new third element of "unnecessary hardship" is broader than just property values. Indeed, the specific reference to the "private rights of others" raises the (scary!) possibility that the ZBA may now have to consider and actually rule on challenges to variances brought by opponents who claim that the proposed use is prohibited by private covenants in a deed, or because the boundary of the property is disputed, for example. We can only hope that the court did not mean to include that kind of dispute as within the issues that the ZBA must resolve, but only time will tell as new variance cases are decided.

In the meantime, and as a general matter, the ZBA should not be overly concerned about this third element of "unnecessary hardship" unless there is convincing evidence that there will be a significant decrease in surrounding property values, or some clear harm to public health, safety or welfare if the variance is granted.

IV. WHAT ABOUT THE OTHER FOUR PARTS OF THE VARIANCE TEST?

The applicant must still demonstrate that he or she meets the other four parts of the traditional variance analysis, although there are overlaps between each of those four parts and the new "unnecessary hardship" test. That is, the applicant must show:

(1) that no diminution in the value of surrounding properties would occur (we've seen that this overlaps to some degree with the third element of the new "unnecessary hardship" test);

(2) that the proposed use would not be contrary to the spirit of the ordinance (overlaps with the second element of the new "unnecessary hardship" test);

(3) that granting the variance would not be contrary to the public interest (overlaps with the third element of the new "unnecessary hardship" test); and

(4) that granting the variance would do substantial justice (overlaps with the first element of the new “unnecessary hardship” test).

V. IS THE OLD “UNNECESSARY HARDSHIP” TEST GONE FOREVER?

As Bernie Waugh points out, probably not. It is possible to imagine a situation where, for example, the applicant could not meet the second element of the new test (because there is a fair and substantial relationship between the general purpose of the restriction and the effect that the restriction has on the applicant’s property), but where because of special circumstances the zoning restriction leaves the applicant with no reasonable use of the land.

In such a case, the applicant is still entitled to the variance because without it the applicant’s property would be effectively “taken” by the zoning restriction. It does not appear that the supreme court recognized this aspect of its *Simplex* decision!

SUPREME COURT WASN'T JOSHING WHEN IT RELAXED THE UNNECESSARY HARDSHIP STANDARD TO OBTAIN A ZONING VARIANCE!!

Rancourt v. City of Manchester, 149 N.H. 51 (2003)

And you thought the court was kidding when it decided Simplex Technologies, Inc. v. Town of Newington, 145 N.H. 727 (2001)? The Rancourt case is the first time the supreme court has dealt squarely with the unnecessary hardship test since it announced the new standard in Simplex, and there is no doubt that the new "unnecessary hardship" test is very different from the old.

The plaintiffs are abutters to residential property in Manchester owned by Joseph and Meredith Gately. The Gatelys contracted to have a single-family home built on their 3-acre lot. The Gatelys also wished to build a barn to stable two horses on 1½ acres located in the rear part of the lot, but livestock, including horses, are prohibited in that district under the zoning ordinance. The Gatelys applied for a variance to allow the horses, which was granted by the ZBA. The angry abutters first appealed to the superior court, which affirmed the grant of the variance, and then to the supreme court, which also affirmed.

The supreme court first noted that in Simplex "we departed from our traditionally restrictive approach to [unnecessary hardship] . . . We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property." The court went on to restate the Simplex unnecessary hardship test as follows:

Under Simplex, to establish "unnecessary hardship," an applicant for a variance must show that:

(1) a zoning restriction applied to the property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment;

(2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

(3) the variance would not injure the public or private rights of others.

The court summed up the new test by stating that applicants for a variance no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment.

The court noted that the statutory basis for variances, RSA 674:33, I(b) requires that "special conditions" must be present, and pointed out that before Simplex, unnecessary hardship "existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned." After Simplex, "hardship exists when special conditions of the land render the use for which the variance is sought "reasonable." Thus, in the first prong of the Simplex test, "special conditions" are referred to as the property's "unique setting . . . in its environment." I think the court means by this that there are always "special conditions" present, being each property's unique setting in its environment. The first prong of the new hardship test thus looks at whether the proposed use is "reasonable" given that unique setting.

The facts in this case showed that the Gately's lot was located in a country setting, that it was larger than most of the surrounding lots, was uniquely configured in that the rear portion of the lot was considerably larger than the front, and that there was a thick, wooded buffer around the proposed paddock area. In short, the supreme court agreed that both the ZBA and the trial court could logically have concluded that these "special conditions" (i.e., the property's unique setting in its environment) made the proposed stabling of two horses on the property "reasonable."

SELF-CREATED HARDSHIP IS MERELY ONE FACTOR TO CONSIDER UNDER THE VARIANCE TEST FOR UNNECESSARY HARDSHIP

Hill v. Town of Chester, 146 N.H. 291 (2001)

In 1997 the Hills bought a 1.3 acre parcel from family members for $40.00 (yes Virginia, that's "forty dollars"); the lot was part of a larger parcel owned by the family trust, and title would go back to the trust if the Hills didn't build a house on it within five years.

The lot lacked the minimum lot size and frontage now required under the zoning ordinance (although the lot had been taxed by the town as a buildable lot), and the ZBA denied a variance, partly on the grounds that there was no unnecessary hardship

because the trust could have adjusted the size and frontage of the lot to comply with the ordinance -- the hardship was thus not “unnecessary,” but “self-created.” The superior court reversed the ZBA, ruling that because the lot was taxed as buildable (until the variance was denied!!) the plaintiffs had no actual or constructive knowledge that the land was nonbuildable at the time they purchased it, and that the hardship was not self-created. The supreme court ruled in favor of the town, sort of.

Taxable Status; Knowledge of Zoning Restrictions

The supreme court breezed through these two issues (the superior court was wrong on both) by repeating the rule that the method by which a town taxes land is not dispositive in determining zoning questions (although it is one factor that can be considered, and might determine the outcome of a close case on bad facts); see Mudge v. Precinct of Haverhill Corner, 133 N.H. 881 (1991). Also, landowners are deemed to have constructive notice of the zoning restrictions that are applicable to their property (which means the law will assume the landowner has read the zoning ordinance even if she hasn’t); Trottier v. City of Lebanon, 117 N.H. 148 (1977).

Self-Created Hardship and the New Simplex Hardship Tests

The court then clarified its holding in Ryan v. City of Manchester, 123 N.H. 170 (1983), by ruling that it is "implicit" in Ryan that a self-created hardship does not automatically disqualify the person from receiving a variance, rather, “it is just one factor to consider.”

Moreover, the court expressly declared that the self-created hardship factor should be considered under the first prong of the hardship test set forth in the Simplex case.

That first prong requires the applicant for a variance to show that the “zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment.” Thus, if the zoning restriction that interferes with the proposed use comes into play because of self-created circumstances, that fact will certainly have an influence on whether the ZBA considers the proposed use to be “reasonable.” This factor comes into play not only where the landowner has made some physical change to the property which creates the need for the variance, but also where a landowner purchases property with a perfectly obvious limitation that makes it unsuitable for the intended use under the zoning ordinance.

CASES ON NONCONFORMING ("GRANDFATHERED") USES

HOW MUCH IN-*VEST*-MENT DOES IT TAKE TO BECOME VESTED?

AWL Power, Inc. v. City of Rochester, 148 N.H. 603 (2002)

In August, 1987, the Rochester Planning Board approved a development plan for about 24 acres that would create 18 single family homes and a 59-unit condominium. The approval was subject to the condition that the developer construct a number of public improvements on the property, including a sidewalk, a sewer line extension, a fence and a road.

About a year after the planning board's approval, the zoning ordinance was amended, which rendered the proposed condominium and many of the unbuilt single-family houses nonconforming. The city, however, allowed the developer to continue the development according to the 1987 approved plan. During the 3 years that followed the approval, the developer built 6 of the 18 houses, and spent slightly over $200,000 on the public improvements, finishing the sidewalk and sewer line construction; it also paid the city a $50,000 impact fee for off-site improvements.

The parties in this case did not dispute that the original developer met the requirements of RSA 674:39 which grants a four-year exemption from subsequently enacted zoning restrictions, running from the date of recording of an approval, provided the builder begins "active or substantial development" on the property within 12 months of the approval. The parties thus agreed that the city could not have blocked the developer's proposed construction under the amended zoning ordinance until at least August, 1991 (4 years from the original approval).

In 1990, all construction ceased on the site because of the downturn in the real estate market, and the developer did not seek to resume construction for 10 years. In April, 2000 the developer notified the city of its intention to finish the project. In response, the city reviewed the project and determined that the developer had completed 43.2 percent of the required public improvements, and 10.7 percent of all the combined public and private improvements. Based on this study, and following a public hearing, the planning board found that the developer's right to complete the project had not vested, and that the changes in the zoning ordinance, no longer stayed by the statutory four-year exemption, barred the completion of the project. Based on this finding, the planning board revoked the 1987 project approval.

The developer appealed to the superior court, arguing that the right to complete the project had vested and could not be revoked. The superior court compared the $200,000 that had been spent on the public improvements to the projected cost of the entire development which was almost $6,500,000. Without taking into account the completion of the 6 houses, the court concluded that the developer had completed only about 3% of the project, and agreed with the planning board that this small percentage was insufficient to constitute the "substantial construction" necessary to vest the right to

complete the project under the common law standard articulated in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970).

Test to Determine "Substantial Construction" is Absolute, Not Relative (Sometimes)

On appeal, the supreme court ruled that the trial court had used the wrong approach in considering what percentage of the overall project had been completed before the zoning ordinance was amended. The court outlined the following three bases for its rejection of the "percentage of completion approach" to vesting:

1. Prior cases do not support the "percentage of completion approach"

The court looked at some of the earlier cases about vesting and pointed out that "we have never held that completion of a certain percentage of construction is the exclusive method by which the rights of a developer may vest," and that in the case of Piper v. Meredith, 110 N.H. 291, 299 (1970) the court had gone out of its way to declare that "each case presents a question of fact peculiar to its own set of circumstances."

2. The "percentage of completion approach" conflicts with the common law rationale for vesting

The court said that common law vesting rights stem from the developer's good faith reliance upon the absence of land use regulations that prohibit the project, and for that reason courts should be liberal about how and when such "good faith" vested rights are created. Against this liberal approach, the supreme court clearly felt that the superior court had simply set the vesting bar too high by using the "percentage of completion approach."

3. The "percentage of completion approach" would lead to anomalous results

Finally, the supreme court said that the "percentage of completion approach" would unfairly burden developers with large or complex plans compared to smaller projects. The court noted that

"In fact, the city's application of this standard has already led to disparate results. At about the same time it considered this case, the city determined that another developer, who had spent no more than $143,000 on his approved plan, had acquired a permanent, vested right to complete his project. The rationale for this decision was that the total cost of the other developer's project was only several hundred thousand dollars, and that the construction completed by the developer thus constituted a substantial percentage of the total. While consistent with the reasoning used by the city and trial court in this case, the trial court's standard places as much emphasis on the size of the overall project as it does on the actual reliance of the developer. We thus hold that the superior court erred as a matter of law in interpreting the "substantial construction" standard."

Thus, the supreme court concluded that the correct standard to determine whether "substantial construction" has occurred will take into account not only construction measured against the entire plan, but also whether the amount of completed construction is per se substantial in amount, value, or worth. The court agreed with the developer that its expenditure of over $200,000 on public improvements and construction of six houses was enough to meet the "substantial construction" standard in this case.

The court also clearly left the door open to apply the "percentage of completion approach" to the vesting of smaller projects where good faith expenditures might not seem *per se* substantial. However, the main point is that "in cases where construction expenditures amount to large sums, construction need not be judged by comparison to the ultimate cost of the project."

Vesting Will Not Always Depend Only on Public Improvements

The supreme court rejected the developer's argument that vested rights should depend only on whether the developer has made "significant expenditures" on the public improvements to the land. The court said that while it is possible that a developer may acquire vested rights solely by the construction of public improvements, that will happen only if the construction was "substantial" and not merely because it constituted a certain percentage of the total public improvements.

What Good is The Vesting Statute, RSA 674:39?

Last, the developer had argued that the four-year vesting statute, RSA 674:39, establishes a standard for the acquisition of vested rights that is easier to meet than the standard developed over the years as the court has decided cases such as Piper v. Meredith (the common law). The court disagreed with this, confirming its earlier ruling in Morgenstern v. Town of Rye, 147 N.H. 558, 563 (2002) that the test for vesting under the statute and at common law is the same.

Indeed, the court pointed out that the principal benefit of the vesting statute for developers is that it provides a developer with additional time (four years) to meet the common law vesting standard of having completed "substantial construction" of the project -- the statutory four years becomes available to the developer if she begins "active or substantial" construction within one year of the approval of the project. The statutory protection is significant; recall that at common law even an approved project could be stopped dead in its tracks if a subsequent land use amendment prohibiting the project was enacted before common law vesting had occurred.

FORMER ACCESSORY USE NOT ALLOWED TO BECOME THE PRINCIPAL NONCONFORMING USE (OR, DON'T GIVE UP THE PIGS!!)

Town of Salem v. Wickson, 146 N.H. 328 (2001)

Richard Wickson owns a 4.1 acre vacant lot in Salem that had been used as a working farm, including pigs, since the 1950's; the farming use became nonconforming when the town's first zoning ordinance was adopted in 1961.

As part of the farming activities, horse, chicken and pig manure were stockpiled, and sand and other materials were brought onto the site to be mixed with the manure; this material was then trucked off the property to market. In 1988, Wickson voluntarily removed the animals and buildings and ceased the farming operation with the intention of establishing a nursery for which he had received site plan approval, but the nursery was never built. It does not seem to have been disputed that Wickson voluntarily abandoned the principal, nonconforming use of farming; see Lawlor v. Town of Salem, 116 N.H. 61 (1976) for a discussion of how to evaluate whether a nonconforming use has been abandoned.

Instead, Wickson continued to use the lot to stockpile earth materials, involving the delivery of some twenty-five eighteen-wheel truckloads per week. In 1990 the town notified him that the stockpiling was not a permitted use, and eventually filed a petition in the superior court seeking an injunction against the use. After a two day trial, the superior court judge dismissed the town's petition, ruling that the use of the property for stockpiling had been continuous and essentially unchanged since the 1950's and was therefore a lawful, nonconforming use.

On appeal, the town argued that when Wickson abandoned the nonconforming farming use of the property, he also abandoned all nonconforming uses incidental to pig farming, including his right to stockpile earth materials; therefore, the continued stockpiling constitutes a substantial change in use. Wickson argued that to determine whether a substantial change in the nonconforming use had taken place, the superior court correctly focused on the consistency of the stockpiling activity, and not whether that activity was incidental to the farming operation that had been abandoned; that is, Wickson argued that no change had occurred because the stockpiling activity still consisted of manure being mixed with earth products for commercial sale just as when the farm existed.

Tests to Evaluate Whether Change to Nonconforming Use is Allowed

In its analysis, the supreme court first repeated the approach set out in earlier cases that to determine whether there has been a substantial change in the nature or purpose of the pre-existing nonconforming use, which is not allowed (unless the local zoning ordinance says otherwise) the court will consider:

(1) the extent the challenged use reflects the nature and purpose of the prevailing nonconforming use;

(2) whether the challenged use is merely a different manner of utilizing the same use or constitutes a use different in character, nature, and kind; and

(3) whether the challenged use will have a substantially different effect on the neighborhood.

So, the first task is to determine the nature and purpose of the use that was in place when the zoning ordinance went into effect (always the "magic moment" in this part of the analysis). The court concluded that "the nature and purpose of the nonconforming use in 1961 was for pig farming and that the stockpiling activity was incidental and subordinate to the farming activity." (As shorthand, this finding is the equivalent of a finding that the stockpiling was an "accessory" use in support of the principal use of farming.) The court noted that the courts in some other States have adopted a firm rule that a nonconforming use that is accessory to a principal use can never be converted to a principal nonconforming use, but declined to consider adopting that hard and fast rule on the technicality that the town had not argued that the rule should be adopted when the case was before the superior court.

Because it refused to adopt the hard and fast rule (but did it, really?? -- see below!), the court went on to consider whether Mr. Wickson's revised stockpiling activity constitutes a use different in character, nature and kind. The court ruled that it does, observing that at the time the zoning ordinance was adopted in 1961 earth materials were brought onto the lot and stockpiled to assist in removing a by-product of the principal pig-farming activity -- the character and nature of the stockpiling after the farming was abandoned is wholly unrelated to pig farming, and all materials are brought in from off-site. Therefore, the supreme court rejected the superior court's finding that the use had remained essentially unchanged since before zoning was adopted.

The heart of the case lies in the court's disagreement with Mr. Wickson's argument that any use that is "similar" to the nonconforming use for stockpiling is a natural expansion of that nonconforming use, since the argument "misconstrues the purpose of the right to continue a pre-existing lawful use." The court went on to explain:

The right to continue a pre-existing lawful use vests in the property because a substantial reliance has been placed on that use . . . at the time the ordinance creating the nonconforming use us enacted. Accordingly, nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance creating the nonconforming use. Here, any claim that substantial reliance had been placed upon the use of the lot for stockpiling was directly related to the nonconforming use of the property as a pig farm. The fact that the stockpiling activity of mixing manure with earthen materials has continued without interruption is irrelevant, because the right that vested with the property was to continue pig farming. Therefore, unless the stockpiling

is closely related to the pig farming, it is not the expansion of a natural activity closely related to the nonconforming use.

The court went on to find that the stockpiling also flunked the third part of the test, since the use does have a substantially different effect on the neighborhood ("it is inconceivable that sixty-five pigs could create enough waste to require anywhere near the twenty-five eighteen-wheel truckloads per week involved in the new stockpiling operation"). However, that finding was not critical to its decision, and is an anticlimax.

When Is a Firm Rule Not a Firm Rule??

Although the court said it would not adopt a "firm rule" that an accessory use can never be converted to a principal nonconforming use as the town had requested, the practical effect of its decision may amount to the same thing. The court was unequivocal that "the right that vested with the property was to continue pig farming," which was the principal use of the property that became nonconforming the moment the zoning ordinance was adopted in 1961. Since the principal use was later abandoned, the new stockpiling activity could not be "the expansion of a natural activity closely related to" pig farming because there is no more pig farming. Therefore, how could a use that was accessory to a former nonconforming use that was then discontinued *ever* be allowed as a substitute, principal nonconforming use of the property?? It seems logically impossible, because the former accessory use will never be able to claim that it is still closely related to the former principal use. Sure seems like a firm rule to me!!

PLAINTIFF MUST PROVE THAT DISCRIMINATORY ENFORCEMENT OF ZONING ORDINANCE WAS CONSCIOUS AND INTENTIONAL; SOME INTENSIFICATIONS OF NONCONFORMING USES ARE ALLOWED AS A MATTER OF RIGHT

Pope v. Little Boar's Head District, 145 N.H. 531 (2000)

The plaintiff owns a small ice cream stand, the Beach Plum, in the Little Boar's Head District of the Town of North Hampton. Established before the area was zoned residential in 1937, the operation was closed during World War II, and re-established under a conditional variance in 1946. The conditional variance restricted items sold from the stand to principally products of the owner's dairy, and only for the retail sale of his ice cream, cream, milk, buttermilk, frappes, and other dairy products, hot dogs, tonics, candy, popcorn, potato chips, peanuts, cigarettes, cigars, and chewing gum.

Interestingly, there is a small restaurant located just a few hundred yards from the Beach Plum, called Andrews-by-the Sea; in 1992 the District Board of Commissioners, after an "informal" meeting (!!!), granted Andrews-by-the Sea a one-year permit for a take-out window. Then, in a 1993 letter, the building inspector and commissioner, without conducting a hearing (!!!), gave Andrews-by-the Sea permission to operate the take-out window permanently.

In 1996, Mr. Pope, the latest owner of the Beach Plum, applied for a special exception under the zoning ordinance to expand his menu items to include coffee, tea, hot chocolate, hamburgers, cheeseburgers, muffins, doughnuts, pastries, and cold sandwiches. He did not seek to make any physical alteration to the building, but claimed that he was seeking to intensify his nonconforming use. The special exception was denied, which was particularly unsettling to Mr. Pope in light of the easy time his competition had at Andrews-by-the Sea.

Mr. Pope appealed the denial of the special exception to superior court, alleging that (1) it is unlawful for the District to not have a provision in its zoning ordinance so that a property owner can receive permission to intensify, as opposed to expand physically, a nonconforming use; and (2) the District applied the zoning ordinance in a discriminatory manner because of the way it allowed his competitor, Andrews-by-the Sea, to install a take-out window. The superior court judge was so upset about what seemed to him to be blatant discrimination that the never ruled on the first argument. Instead, the judge found that the District had enforced the zoning ordinance in a discriminatory manner, and ordered it to either allow the expanded sales requested by Mr. Pope, or enforce its ordinance against all businesses similarly situated and in direct competition with Mr. Pope. The District appealed to the supreme court.

On appeal, the supreme court stated flatly that a finding that a municipality selectively enforced its zoning ordinance in a discriminatory manner requires evidence that any discrimination was conscious and intentional. Although that is an incredibly hard thing to prove, it seems an appropriate burden to avoid a situation where good faith, but uneven or negligent, enforcement decisions could allow similarly situated property owners to simply ignore the ordinance. Certainly such a result would not be in the public interest and it is for that reason that the court has justifiably set the bar in a very high place when a plaintiff claims discrimination. Because the superior court did not consider whether any discrimination was conscious and intentional, the supreme court remanded the case (sent it back down to the superior court) for further proceedings.

Nonconforming Use v. Use Allowed by Variance

The poor old much-maligned supreme court had its eyes wide open on this one! It went on to point out that although everybody was arguing about the Beach Plum being a pre-existing nonconforming use, it seemed to the court that it really is a use established (or at least re-established) after zoning was adopted by virtue of the conditional variance that was granted in 1946. As such, perhaps Mr. Pope should have sought a modification of the conditions placed on his variance, rather than seeking a special exception under the ordinance. In this regard, the supreme court recognized the authority of the ZBA “to modify conditions previously imposed with respect to the grant of a variance.”

Intensification of Nonconforming Use as a Matter of Right

The supreme court also pointed out that if Andrews-by-the Sea is a nonconforming use, the addition of the take-out window that seems so improper because permission for it was granted without any public proceedings may have been permissible as a matter of right. That is so because it is the law that a property owner who seeks to expand or "intensify" a nonconforming use internally may do so as a matter of right if the intensification will not result in a substantial change to the effect of the use on the neighborhood. See Ray's Stateline Market, Inc. v. Town of Pelham, 140 N.H. 139 (1995). Thus, on remand the superior court should also consider whether the uproar about the different treatment afforded Andrews-by-the Sea was merely a tempest in a teapot.

TEST FOR EXPANSION OF A NONCONFORMING USE IS MORE RESTRICTIVE THAN THE TEST FOR "CHANGE OF USE" FOR SITE PLAN REVIEW

Town of Seabrook v. Vachon Management, Inc., 144 N.H. 662 (2000)

In 1990, the defendants opened a business known as "Leather and Lace" in unit one of a six unit building on Route 1 in Seabrook - the business sold adult books, magazines, videotapes, and paraphernalia and later installed coin-operated video booths. The adjacent unit, unit two, was occupied by a third party who used it for retail computer equipment sales. For some time, Leather and Lace also presented live entertainment in unit one, including mud and oil wrestling, but that activity stopped in unit one after the town's building inspector informed the owner that the addition of live entertainment would require site plan approval from the planning board since it constituted a change of use from retail sales.

In fact, as soon as the computer sales operation moved out of unit two in 1992, Leather and Lace expanded into it without notice to the town, and began offering mud wrestling and bachelor parties. Eventually, part of the wall separating the two units was removed, and live nude dancing was substituted for the mud wrestling and bachelor parties in unit two.

In 1994 the Town of Seabrook amended its zoning ordinance to regulate sexually oriented businesses; the regulations prohibit any such business from operating within 1,000 feet of a place of worship, 300 feet of a residence, or 500 feet of the town boundaries. Leather and Lace violated the new restrictions by virtue of its proximity to the town border, a residence and a church.

In 1997 the town discovered that unit two was being used for live nude dancing and sought an injunction in superior court to stop it. Following a trial, the superior court denied the injunction, finding that mud wrestling was a preexisting nonconforming use that was unaffected by the 1994 zoning amendment, and implicitly concluding that live nude dancing was a lawful expansion of mud wrestling.

The supreme court reversed, agreeing with the town that live nude dancing in unit two is not exempt from the 1994 ordinance as a grandfathered use. The key to the decision is that only lawful preexisting uses are protected from later enacted zoning restrictions, so that they may continue as nonconforming uses. When unit two was changed from computer sales to mud wrestling in 1992, it was a change of use from "retail" to "commercial entertainment" under the ordinance at the time. In order to be lawful, the owner was required to seek and receive site plan approval for the change from the planning board. Since the owner never applied for site plan approval, mud wrestling was never lawfully established and therefore neither it nor the later addition of live nude dancing were protected from the restrictions imposed by the 1994 sexually oriented business amendment.

The court went on to provide clarification as to when a change of use is sufficient to trigger the need for site plan review. The defendants argued that in order to require site plan approval, the change in use must be substantial, a test similar to that used to determine if an expansion of a lawful nonconforming use is permitted. The court disagreed, ruling that

> the purpose of requiring site plan approval is to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety or prosperity of abutting property owners or the general public. If a town is not permitted to review site plans for all changes in use, it will be unable to measure the impact of such changes on the existing infrastructure and site conditions to protect the public health, safety, and welfare.

PRACTICE POINTER: Do not confuse the court's ruling that all changes of use are subject to site plan review (assuming, of course, that the new use is either multi-family or nonresidential as provided under RSA 674:43, I) with the incorrect idea that any change to an existing use is subject to site plan review. The court's ruling does not address expansion of an existing use, such as adding a table or two to an existing restaurant. It merely states that when a restaurant changes to, say, retail sales, site plan review is required even if the owner argues that the changed use is not substantially different from the existing use, or that the impact on the surrounding properties, traffic patterns and the like, will not change.

SITE PLAN REVIEW; ASSISTANCE TO APPLICANTS

PLANNING BOARD NOT LIMITED TO SPECIFIC LIMITATIONS IN LOCAL ORDINANCES WHEN REVIEWING SITE PLAN APPLICATION

Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75 (2004)

The plaintiff is a commercial business engaged in heavy equipment sales and service at a location about ½ mile west of the intersection of Route 93 and Route 3 in Tilton. The plaintiff wished to install a ninety-foot flagpole to fly a 960 square-foot American flag, and filed an application with the planning board to amend its site plan.

The board's site plan regulations set forth the purposes served by site plan review as follows:

> a. To provide for the safe and attractive development . . . of the site and to guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of:
> . . .
>
> (3) Undesirable and preventable elements of pollution such as noise ....
>
> . . .
>
> b. To provide for the harmonious and aesthetically pleasing development of the municipality and its environs; [and]
> . . .
>
> h. To include such provisions as will tend to create conditions favorable for health, safety, convenience and prosperity.

Based on these regulations, the board noted the following concerns with the plaintiff's site plan: (1) the required lighting of the flag at night; (2) a ninety-foot flagpole would exceed the zoning ordinance's height limitations on buildings; (3) the noise associated with the flag in windy conditions; (4) the safety concerns from ice falling or the pole itself falling; and (5) improper use of the flag for advertising.

The board directed several questions to the plaintiff's representatives, Chris Rice and Jason Kahn. Mr. Rice was unable to answer the board's questions about the size of the pole, the effect on the neighborhood of the required lighting and the potential noise. In answering why a ninety-foot flagpole was required, Mr. Kahn first stated the purpose was to draw awareness to the flag. The board's minutes also reflect that "Mr. Kahn stated [the plaintiff] was trying to develop a brand presence. [The plaintiff] was trying to develop this brand as one identity and a 90 foot flag was one of his identities." In addressing the safety and noise concerns, Mr. Kahn stated that the manufacturer could provide information about the noise generated by flags flying in the wind and that the flagpole would be "fully engineered." He also stated that ice would not adhere to the flag and that the pole was tapered. The board approved the proposal conditioned on a height restriction of fifty feet, the same height restriction in the town's zoning ordinance for buildings. The board imposed the height restriction based upon concerns about safety, noise and aesthetics.

The applicant appealed to the superior court, which ruled that the planning board had reasonably determined that the applicant had failed to address the board's concerns about safety, noise, and the effect on the area aesthetics of lighting the flag and flagpole.

On appeal to the supreme court, the applicant argued that the planning board's denial was unlawful because there is no local ordinance in Tilton that prohibits the installation of a ninety-foot flagpole; pointing to the specific height limitation on buildings contained in the zoning ordinance, the applicant argued that the lack of such a limitation for flagpoles prevented the planning board from denying the application.

The supreme court disagreed with this argument. The court stated that site plan review is designed to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public. Moreover, the planning board has authority under site plan review to impose requirements and conditions that are reasonably related to land use goals that are within its purview. Most importantly, in upholding the exercise of discretion by the planning board, the court wrote that

> Where the role of site plan review is to ensure that uses permitted by the zoning ordinance are appropriately designed and developed, restricting the board's authority to the specific limitations imposed by ordinances and statutes would render the site plan review process a mechanical exercise. The planning board properly exercised its authority to impose conditions that are reasonably related to the purposes set forth in the site plan regulations; namely, the "safe and attractive development" of the site. Therefore, the superior court did not err in upholding the board's decision.

Finally, one justice dissented from the opinion, stating that he believed the planning board did not give the applicant a sufficient opportunity to address its concerns. Perhaps the reason that this concern was not shared by a majority of the court is that there was no evidence in the record to show that the applicant requested additional time to address the issues raised at the public hearing. If the applicant had requested such additional time, but been denied that opportunity to come back to a continued hearing with additional evidence, I strongly suspect that the outcome of this case would have been different.

PLANNING BOARD WAS REASONABLE IN REQUIRING ADDITIONAL BUFFERING TO PROTECT ABUTTING RESIDENTIAL USE

Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167 (2003)

Bayson sought site plan approval for the construction of a 56,000 square foot Hannaford grocery store on its property, along with a parking lot to accommodate 302 cars. Over the course of several months, the planning board held seven public hearings on the application and conducted an official site visit; most of the public hearings exceeded three hours in length. Finally, by a four to three vote, site plan approval was denied for failure to comply with landscaping and traffic provisions in the site plan regulations. Bayson and Hannaford appealed to the superior court, and the court upheld the denial. The supreme court agreed that the board's denial was supported by the evidence and not legally erroneous. The major issues are described as follows.

Bias of Planning Board Chairman

The acting chair of the planning board had participated in an earlier effort to rezone the property so that it could not be used for commercial purposes, but the city council had declined to change the zoning. At the first public hearing, the chair did exactly the right thing: she disclosed that she had been in favor of the rezoning, but had no problem with chairing the board's review of the site plan in a fair and impartial manner. She also asked any planning board member who could not act fairly and impartially to step down, but no member did so. The chair then asked if the applicant or any member of the public believed that any member of the board was prejudiced with respect to the site plan application they should please offer their objection, stating which board member should step down and why — no objections were raised.

Three months later the applicant's attorney made a vague reference at a public hearing about his feeling "that there are people on the Board who do not appear to like the fact that it is a commercial zone and the proposed use is an allowed use."

On appeal, the supreme court restated the rule that an objection to the impartiality of a member of a land use board member must be raised "at the earliest possible time" so that the matter can be addressed and corrected if necessary. Because the chairman raised the matter of her involvement in the rezoning effort at the beginning of the first public hearing, the applicant lost its right to later complain because it did not challenge her impartiality at that time.

Additional Buffering Required

The applicant sited the grocery store on that portion of the lot that most closely abuts those lots on which residential or low-intensity office uses were already situated. Moreover, the most intensive activities, the site driveway and loading dock, was proposed to be placed less than fifty feet from a Genesis Elder Care Facility on an adjacent parcel! The planning board determined that to adequately protect the residential uses of the surrounding sites, a twenty-five foot landscape buffer and additional buffering would be required "to remediate negative sight, noise and pollution impacts attendant to the proposed development, with respect to the abutting Genesis Elder Care Lot." On appeal, the applicant argued that the twenty-five foot buffering would have provided adequate noise protection for abutting residences, and that no additional buffering was necessary. The court upheld the planning board's judgment, based at least in part of the difficulty of enforcing some voluntary restrictions which the applicant proposed, as follows:

> The plaintiffs expect truck deliveries to the site of from two to four tractor-trailers per day, two to three days per week, and up to forty smaller vendor trucks per day. The plaintiffs offered to limit truck delivery hours to the site from 5 a.m. through 9 p.m. to alleviate noise generated from idling trucks, braking, back-up warning beeping, truck doors opening and closing and dock loading and to build a twenty-five-foot tall wall. The board found, however, that such voluntary provisions

were "unrealistic" and "unenforceable" because: (1) "it is unclear to what extent the applicant can enforce the proposed restrictions on private vendor trucks"; (2) "testimony . . . indicate[d] that turning diesel truck engines on and off may be harmful to the longevity of such engines and that refrigeration compressors on some trucks would likely not be turned off during deliveries"; (3) the "difficulties inherent in enforcing the proposed restrictions . . . due to lack of city enforcement staff and the intermittent nature of potential noise and activity violations"; and (4) "the fact that many residents of the Genesis Elder Care facility sleep during the times in which the applicant anticipates the most intensive loading/unloading activities would take place."

The trial court found that "in light of these problems with the plaintiffs' voluntary restrictions, any one of which would be enough to support a finding of reasonableness on the Board's part, . . . the Board's finding, that the restrictions would not fully remediate potential noise concerns, thus justifying the imposition of additional buffers, was reasonable."

PRACTICE POINTER: Perhaps the most interesting aspect of this decision is the fact that the planning board was allowed to reject the efficacy of the applicant's voluntary restrictions based on the difficulty of enforcing those restrictions. In other words, a planning board is not required to accept voluntary restrictions proposed by an applicant that attempt to mitigate impacts on surrounding properties – the planning board can still deny the application if it reasonably determines that enforcement of those voluntary restrictions would be difficult, if not impossible. Perhaps this outcome doesn't seem too surprising, but it is surely nice to have the court confirm in plain language the board's authority to reject such restrictions!

Guidance Offered to Applicant

On appeal, the applicant also argued that the planning board held it to such an impossibly high standard that the practical effect was to rezone the property so that no commercial use could be made of it. The court rejected this argument, finding that, to the contrary, "the board provided the plaintiffs with ample input and guidance for bringing the application into compliance with the site plan regulations." Also telling on this point was the fact that the board's denial of the application had been made "without prejudice to the applicant's right to submit a revised application that adequately addresses the Board's concerns." The fact that the plaintiffs were unwilling to reduce the size of the proposed building, relocate the proposed building or substantially change the layout of its site plan to enable it to meet the concerns of the board, does not establish a "rezoning" of the property.

COURT REAFFIRMS PLANNING BOARD'S OBLIGATION TO PROVIDE ASSISTANCE TO APPLICANTS

The Richmond Company, Inc. v. City of Concord, 149 N.H. 312 (2003)

In this case, the supreme court reaffirmed the obligation of municipalities to provide assistance to those seeking land use approvals, and held that the Concord Planning Board had behaved properly in this case. Let's take a look at the details.

Richmond applied to the Concord Planning Board for site plan approval to construct a shopping center, including a supermarket, on a 34 acre parcel off South Main Street in Concord. The proposal called for the demolition of all existing structures on the property and the construction of four retail buildings with a total of approximately 180,000 square feet. Given the location of the property, the applicant was required to satisfy the requirements for development standards and special design criteria in the city ordinances.

Following several public hearings at which testimony and documentary evidence were received, the board voted unanimously to deny Richmond's site plan application because it failed to meet the requirements of city ordinance 28-11-7. Specifically, the board concluded that the Richmond project failed to satisfy criteria of the ordinance in that:

1) the project would not generate either a short term or long term expansion of the city's economic base;

2) the applicant's economic impact statement did not adequately address the fiscal costs and net fiscal impacts to the city for municipal services;

3) the application failed to address certain ancillary employee benefits;

4) the project was incompatible with the existing architectural and historic character of the area; and

5) the project was not specific to the site and the design did not enhance the scenic and/or recreational uses of the South End Marsh, which is part of the Merrimack River watershed and floodplain.

Richmond appealed to the superior court, which found that the planning board's decision was not supported by the evidence and that the board failed to share any of its concerns regarding Richmond's compliance with the city ordinance, thereby depriving Richmond of the opportunity to address and remedy any problems – thus, the court held, the planning board had failed to engage in a good faith dialogue with Richmond to assist it in satisfying the requirements for site plan approval. The superior court then remanded the case back to the planning board, and both sides appealed to the New Hampshire Supreme Court (Richmond appealed because it didn't want to go back to the

planning board, it said the superior court should simply have granted it site plan approval).

On appeal, the supreme court reminded towns “that it is their function to provide assistance to their citizens, and that the measure of assistance certainly includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order.”

Richmond argued that the board failed to provide meaningful assistance because it did not comment on or question the substance of Richmond’s application during the public hearings as it related to the city ordinance. The supreme court disagreed, saying that this was not a case where the board ignored the application or otherwise engaged in dilatory tactics in order to delay the project – indeed, the court ruled that it was appropriate for the board to “maintain a certain level of impartiality” during the public hearing process. Also, the court pointed out that Richmond acknowledged that its site plan project received "rigorous review," and that it was appreciative of the input from the board, city staff and the public throughout that application process. It further stated that "well prior to the submittal of the Application, the Applicant discussed its plans for the area with City Administration, the City's Engineering and Planning Departments, City Councilors and numerous others."

Moreover, throughout the hearings, members of the public commented on whether Richmond's project complied with the applicable section of the city ordinance. At the close of the hearings the board allowed Richmond to offer rebuttal testimony. Further, Richmond filed a detailed letter with the board on the final day the board accepted evidence, addressing issues raised throughout the hearing, including issues relating to the project's compliance with the criteria in the city ordinance. The court held that fact that the board did not comment on the suitability of the project in response to Richmond's inquiries prior to its deliberative session and vote is neither inappropriate nor unusual since the purpose of the board's deliberative session is to decide the issues.

PRACTICE POINTER: Although the court did say it is appropriate for the planning board to “maintain a certain level of impartiality” during the public hearing process, the point of this case is that it is clearly the planning board’s job to give guidance to the applicant about what may be wrong with its development proposal, both from a technical (there is stuff missing that you need to provide) and from a substantive standpoint (here is where we think your proposal doesn’t comply with our land use regulations). Don’t just lie back watching the show, and then hand out a denial after the public hearing process is closed – have a dialogue with the applicant as you go through the process, giving the applicant an opportunity to adjust the proposal to meet your legitimate concerns and those of the abutters and other interested persons.

APPEALS

APPEAL FROM PLANNING BOARD'S INTERPRETATION OF THE ZONING ORDINANCE MUST FIRST GO TO THE ZBA

Heartz v. City of Concord, 148 N.H. 325 (2002)

The complicated facts of this case are not important to our understanding of the rule that comes out of it. The supreme court interpreted the provisions of RSA 676:5, III, which gives the ZBA authority to review the planning board's interpretation of the zoning ordinance, as being mandatory in order to preserve the right to appeal to court.

In other words, if an applicant or abutter is not happy with the planning board's interpretation of the zoning ordinance in the course of its review of a subdivision or site plan application, that unhappy person MUST first appeal that portion of the planning board's decision to the ZBA in order to preserve their rights to eventually seek court review. If the unhappy person DOES NOT first appeal to the ZBA, she gives up her right to bring the zoning portion of the matter to court.

PRACTICE POINTER: Frequently, the planning board's final decision on a complex subdivision or site plan application will include within it the planning board's determination of how the zoning ordinance applies to the proposal, and how the planning board's subdivision and/or site plan regulations should be interpreted and applied to the project. (See Hoffman v. Town of Gilford, 147 N.H. 85 (2001), a case which foreshadowed the result of Heartz case). Under the state of the law after Heartz, to preserve their rights the unhappy party must first appeal the purely "zoning" questions to the ZBA under RSA 676:5, III while at the same time appealing the "planning" issues (those arising from the application of the subdivision and site plan regulations) directly to the superior court under RSA 677:15! In such a case, the superior court would no doubt be willing to put a hold on any proceedings in the direct appeal from the planning board until the zoning issues either were resolved once and for all at the ZBA, or also came up on appeal from the ZBA where they could then be consolidated with the direct appeal from the planning board and tried at the same time. Awkward.

This split appeal process is what is classically referred to in law schools as "a trap for the unwary," and will no doubt be the source of grief in the future. It doesn't have to be this way. When the legislature amended the statutes to give the ZBA an opportunity to review disputes about the planning board's interpretation of the zoning ordinance, it could not know that the court would eventually interpret that appeal process to be mandatory. The legislature is free to tinker with the process if it does not approve of the post-Heartz world we are at least temporarily inhabiting!

BOARD OF SELECTMEN IS THE ONLY TOWN BOARD THAT CAN APPEAL A ZBA DECISION TO SUPERIOR COURT

Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment, 149 N.H. 63 (2003)

Well, it finally happened. Many of us were waiting for a case like this to come along to clear up an uncertainty in the statutes about which town boards or officials have authority to pursue an appeal of a ZBA decision to the courts.

In July, 2000 the Hooksett Conservation Commission reviewed an application for site plan approval submitted to the planning board for a convenience store and retail gasoline sales facility. The commission provided a memo to the planning board stating its determination that the zoning ordinance prohibits "automobile service or repair shops" in the proposed location. The planning board sought an interpretation of the zoning ordinance from the town's code enforcement officer, who then issued a formal zoning interpretation in which he concluded that the proposed use is permitted under the zoning ordinance. The conservation commission appealed the CEO's formal interpretation to the ZBA under RSA 676:5, and the ZBA upheld the CEO's ruling that the use is permitted. The conservation commission then filed a request for rehearing with the ZBA under RSA 677:2 which was denied, and then appealed the ZBA's decision to superior court under RSA 677:4.

The ZBA filed a motion to dismiss the appeal, arguing that the conservation commission had no authority to appeal to the court (had no "standing" to bring the case to the court) under the language of RSA 677:4. The superior court denied the ZBA's motion to dismiss and then ultimately issued an order agreeing with the conservation commission that the proposed use was prohibited in that location under the zoning ordinance. The ZBA then appealed to the supreme court.

To make a long story short, after a lot of comparison of the history of changes to the three relevant statutes and a consideration of the policy issues involved, the supreme court ruled that the conservation commission could file an appeal with the ZBA in the first instance, but is not allowed to apply for a rehearing to the ZBA if it gets an answer it doesn't like, and is not allowed to take the issue to the courts. The supreme court ruled that under the statutes, only the selectmen are clearly given the authority to not only appeal to the ZBA in the first place, but then to file for a rehearing with the ZBA if the selectmen are not happy with the ruling and then take an appeal to the courts if the ZBA sticks to its original result.

The supreme court reached this result because although RSA 676:5, I permits "any person aggrieved or . . . any officer department, board or bureau of the municipality affected by any decision of the administrative officer" to appeal the initial zoning determination to the ZBA, the language of RSA 677:2 and RSA 677:4 which govern the process after that is not so clear. Instead, RSA 677:2 says that "the selectmen, any party to the action or proceedings, or any person directly affected

thereby" may file for a rehearing with the ZBA, and RSA 677:4 allows "any person aggrieved" (which includes "any party entitled to request a rehearing under RSA 677:2") to appeal to the superior court. The supreme court ruled that the legislature did not intend to include town boards or officials within the definition of who is a "party" under RSA 677:2 with a right to pursue the matter.

The supreme court really had to struggle with this one, because neither the long legislative history of changes to the statutes, nor the current language of the statutes provides a clear answer to the question. To provide that answer, the court considered the policies sought to be advanced by the appeal process, and became "persuaded that the legislature did not intend for all municipal boards to have standing to move for rehearing and to appeal the ZBA's decision to the superior court." In support of that conclusion the court wrote the following (case citations, ellipsis and quotation marks omitted):

> The policy considerations stem from the fact that there are undoubtedly many instances when a municipal board may disagree with a ZBA's interpretation of a zoning ordinance. If municipal boards were permitted to appeal in every such instance, the prompt and orderly review of land use applications would essentially grind to a halt. Suits by different municipal boards could cause considerable delays and thus unfairly victimize property owners, particularly when no party directly affected by the action such as abutters has seen fit to challenge the application. Public funds will also be drawn upon to pay the legal fees of both contestants, even though the public's interest will not necessarily be served by the litigation. Finally, to permit contests among governmental units is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted. Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults. Such wrangling among governmental units should be minimized. In light of the above policy considerations, we conclude that the legislature did not intend to grant standing to request a rehearing to all municipal boards that may initiate an appeal under RSA 676:5.

Of course, the legislature is free to amend the appeal statutes in light of this decision, and the supreme court respectfully invited the legislature to do so if it believes the court misinterpreted the legislature's intent.

WHEN LAND USE DECISIONS ARE NOT CLEAR

ZBA WASN'T CLEAR ABOUT WHICH VARIANCE TESTS WERE NOT MET, AND THE SUPERIOR COURT WASN'T CLEAR ABOUT APPEAL REQUIREMENTS!!

Robinson v. Town of Hudson, 149 N.H. 255 (2003)

This most confusing case started out simply enough. Michelle Robinson owns an old subdivision lot on Mark Street in Hudson that was approved in 1970. Because the

planned road improvements were never done, Robinson's lot has only 50 feet of road frontage instead of the 150 feet required under the zoning ordinance. Robinson applied for a variance from the frontage requirement, which the ZBA denied. The ZBA's Notice of Disapproval specifically found that she failed to meet two of the five conditions for a variance (#1 - the variance would not be contrary to the public interest, and #2 - substantial justice would not be done) (see RSA 676:3, which requires both the ZBA and the planning board to issue written decisions -- if the decision is a denial, the reasons for the denial have to be spelled out in the written decision).

The superior court denied Robinson's appeal on the grounds that she did not challenge the ZBA's decision on all five of the variance grounds when she filed her motion for rehearing with the ZBA!! The supreme court ruled (correctly) that RSA 677:3 does not place a burden on an applicant to raise in a motion to reconsider variance conditions that were not specifically denied by the ZBA.

The town tried to argue that the ZBA did base its denial on each and every one of the five variance conditions, but based on the evidence the supreme court said

> ". . . the evidence presented is insufficient to demonstrate that the ZBA concluded that the petitioner did not meet any of the variance conditions. The worksheet of one member is missing from the record and the remaining worksheets contain votes that are neither unanimous nor clear. The worksheets and minutes are inconclusive as to the findings of the ZBA. As such, the record does not support the trial court's finding that the petitioner failed to meet any of the five conditions for granting a variance."

Because the premise for the superior court's ruling dismissing Robinson's appeal was legally incorrect (the faulty requirement that her motion for rehearing to the ZBA had to include all five variance conditions even if the ZBA's denial was based on less than all five), the supreme court reversed the dismissal and sent the case back down to the superior court.

PRACTICE POINTER: Although the superior court didn't help things, most of the confusion in this case does seem to arise from unclear records of the ZBA's actions. It can't be emphasized too strongly that both the ZBA and the planning board must strive to create a clear record of what was decided, supported by a description of what facts were found by the board to support each decision!

LIMITATION ON AREA SUBJECT TO VARIANCE AND SPECIAL EXCEPTION MUST BE CLEARLY STATED TO BE ENFORCEABLE

(NCES I)

North Country Environmental Services, Inc. v. Town of Bethlehem, 146 N.H. 348 (2001)

This is the first of two cases to reach the supreme court, each of which arose from years of disputes between successive owners of a solid waste landfill in Bethlehem on one hand and the town and concerned citizens on the other. Although the facts and the law involved in the court's decision are complex and peculiar to the situation in Bethlehem, there is one guiding principle that comes out of the decision that offers instruction to all of us who are connected in any way with planning and zoning matters. That principle is: the need to strive for clarity in the use of the English language. Clarity most often results from the expression of simple concepts using simple words. Let's see how failure to follow that principle determined the basic outcome of this case.

Harold Brown owned an 87 acre parcel in Bethlehem. In 1976 he received a variance to operate a landfill, and obtained State approval for the landfill within a four acre footprint on the property. In 1977 the State allowed him to expand the footprint by about an acre; Mr. Brown did not seek any further town approval for that expansion.

In 1983, Mr. Brown received planning board approval for a ten acre subdivision for landfill use, then sold the lot to Sanco, Inc. In 1985, Mr. Brown got approval to subdivide an additional 41 acres for landfill use, and also sold that lot to Sanco.

In 1985-1986, Sanco received a special exception to expand the existing landfill onto the 41 acre parcel. Over the next few years, Sanco received permission from the State to expand the landfill in two stages and several phases, and then sold the entire property to North Country Environmental Services, Inc. ("NCES").

In 1999, the town petitioned the superior court to stop the expansion of the landfill under the State permits, alleging among other things that the expansion was an unlawful expansion of a nonconforming use in violation of the 1976 variance; NCES also filed a petition with the court, asking it to declare that it has the right to gradually expand the landfill onto the entire 87 acres.

The town argued that the 1976 variance contained a limit on the area that the landfill could occupy on the 10 acre parcel. The supreme court agreed with the superior court that the variance contained no such limitation, and pointed out that "the scope of a variance is dependent upon the representations of the applicant and the intent of the language in the variance at the time it is issued (quoting Dahar v. Department of Bldgs., 116 N.H. 122, 123 (1976)). The court found there was simply no language in the variance which expressly limited the area to be used for landfilling, and the ZBA's notice of decision to Mr. Brown simply states that the variance request is "granted and

approved, subject to complete state approval and subsequent supervision." Also, although the variance application contained a "crude map" showing the proposed landfill's approximate location, it contained no statement of the landfill's expected dimensions. Although the town argued that a limit on the size of the landfill should be implied by the reference to the need for future State approval and supervision, the court did not agree that any such implication was strong enough to be enforceable against the landowner.

The town also argued that the 1985-1986 special exception regarding the 41 acre parcel should also be interpreted to contain a limitation on the size of the landfilling that could occur there. As with the variance, there was simply no express limitation contained in the grant of the special exception, and the evidence in support of some implied limitation was just too flimsy.

PRACTICE POINTER: If the ZBA had intended to limit the size of the landfill that could be constructed under the variance, it could have easily done so using simple words, and by requiring the limited area to be shown on a plan that was then clearly incorporated as part of the grant of the variance.

When we sit as land us board members, it is helpful to step back for a minute and try to imagine what questions about the proposed use might come up years in the future, and then try to find clear answers to those questions in the material that is before the board, or being generated by it in the form of minutes, lists of conditions, draft notices of decision and so forth. If there isn't a clear answer to the question in the record, that's a gap that can and should be filled before final approval is granted!

STATE PREEMPTION (OR NOT) OF LAND USE REGULATION

TOWNS HAVE SOME AUTHORITY TO REGULATE SOLID WASTE DISPOSAL FACILITIES

(NCES II)

North Country Environmental Services, Inc. v. Town of Bethlehem,
150 N.H. 606 (2004)

In the first supreme court battle between these parties, reported above, NCES had urged the court to declare that the Solid Waste Management Act, RSA Chapter 149-M, preempted two zoning provisions adopted by the town in 1987 and 1992, as follows:

1987: no private solid waste disposal facility is allowed in any district;

1992: no solid waste disposal facility may be located in any district, and no existing landfill may be expanded, unless the town itself owns the facility.

In the first case, the supreme court did not have to reach the question of whether these zoning provisions were preempted, but the issues that had to be decided in this second case put question of preemption squarely before the court. The zoning question had to be decided because the town challenged the legality of a State permit issued to NCES to develop Stage IV of the landfill, nearly all of which was outside of the fifty-one acres that the landfill could occupy under the decision in NCES I.

Tests for State Preemption of Municipal Regulation

The supreme court first discussed the general contours of the doctrine of preemption, which asks whether local authority to regulate a particular use of land under the zoning enabling legislation is preempted by state law or policy. The court said the following questions must be answered to determine whether the state has preempted a particular field such as the siting of solid waste disposal facilities:

- & does the local ordinance conflict with state law
- & is the state law, expressly or impliedly, intended to be exclusive
- & does the subject matter reflect a need for uniformity
- & is the state scheme so pervasive or comprehensive that it precludes the existence of municipal regulation
- & does the local ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature.

The court next reviewed the details of the statute itself, RSA 149-M, and the administrative rules adopted by the Department of Environmental Services to implement the statutory scheme of state regulation. Not surprisingly, the court concluded that "RSA Chapter 149-M constitutes a comprehensive and detailed regulatory scheme governing the design, construction, operation and closure of solid waste management facilities. Such exhaustive treatment of the field ordinarily manifests legislative intent to occupy it."

Legislature Leaves Some Room for Municipal Regulation

Although the court found the state scheme to be comprehensive and detailed, that finding did not decide the outcome of the dispute because in RSA 149-M:9, VII the legislature has authorized some level of municipal regulation. That section provides:

> The issuance of a facility permit by the department shall not affect any obligation to obtain local approvals required under all applicable, lawful local ordinances, codes, and regulations not inconsistent with this chapter. Local land use regulation of a facility location shall be presumed lawful if administered in good faith, but such presumption shall not be conclusive.

NCES urged the court to interpret this language to mean that a private solid waste facility may be subject only to local regulation of the location of the facility. The supreme court rejected that interpretation, which would have required the court to ignore the word "all" (referring to local ordinances, codes, and regulations) in the first sentence of the provision. However, the court did point out that, "were it not for this provision, we would agree with NCES that RSA Chapter 149-M completely preempts the filed of solid waste management regulation." Moreover, the comprehensiveness and detail of the State scheme requires that the section allowing some local regulation be interpreted "narrowly." Thus, "when evaluating whether a particular local regulation conflicts with the State scheme, courts should err on the side of finding State law preemption, unless the local regulation concerns where, within a town, a facility may be located." (emphasis added.)

1992 Zoning Amendment Is Allowed Under RSA Chapter 149-M

The court went on to rule that RSA Chapter 149-M does not, on its face, preempt Bethlehem's 1992 zoning amendment, because the amendment does not prohibit that which RSA Chapter 149-M permits or vice versa.[2] Thus although NCES had acquired the right as a result of the first supreme court decision to completely use the 51 acre site for its solid waste facility, RSA Chapter 149-M does not on its face invalidate the town's 1992 zoning amendment that has the effect of prohibiting NCES from using the other 36 acres of its land for expansion of the landfill. As the court explained

> The town currently complies with RSA chapter 149-M by granting its residents access to NCES' landfill. See RSA 149-M:17, I; see also RSA 149-M:23-:25. Under these circumstances, it does not violate RSA chapter 149-M for the town to prohibit development of the portion of [the landfill] that falls outside of the fifty-one acres. We agree with the trial court that, with the 1992 amendment, the town has not exempted itself from its obligation to partake in the State plan of integrated solid waste management. The amendment indicates that, in the future, presumably when there is no additional capacity in NCES' landfill on the fifty-one acres, the town will either provide its own facility or assure its residents access to another approved facility. See RSA 149-M:17, I; see also RSA 149-M:23-:25.

But, the 1992 Zoning Amendment Might Be an Unlawful Exercise of the Zoning Power!

Although the 1992 amendment is not preempted by RSA Chapter 149-M, NCES also argued that it is an unlawful exercise of the zoning authority for two reasons: (1) the zoning amendment distinguishes between users of land, not uses of land, contrary to the ruling in Vlahos Realty Co. v. Little Boar's Head District, 101 N.H. 460, 463-64 (1958); and (2) it contravenes the general welfare of the region it affects, contrary to the teaching of Britton v. Town of Chester, 134 N.H. 434, 441 (1991).

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[2]The supreme court's opinion does not decide the legality of the 1987 zoning amendment; the superior court ruled that the amendment is invalid because it is inconsistent with RSA Chapter 149-M.

The supreme court did not decide this question, wisely taking the view that because "the trial court did not address these arguments and as resolving them might require additional factual findings, we remand them to the trial court for resolution in the first instance." The result of all this is that, as of this writing (March 29, 2004), we do not yet finally know whether Bethlehem will be able to stop the expansion of the landfill across the boundary of the 51 acres that it originally permitted.

Some of the Town's Site Plan Regulations May be Applicable to the Area Beyond the 51 Acres

In other cases where the State has enacted a detailed and comprehensive regulatory scheme such as RSA Chapter 149-M, the court has allowed towns to apply site plan review regulations to the regulated project if it does so "in good faith and without exclusionary effect." In other words, the site plan regulations cannot be applied to prohibit a project that receives State approval under the comprehensive State scheme. Some local activists thus argue that the power to apply some local site plan regulations to such projects is the municipal equivalent of being allowed to rearrange the deck chairs on the Titanic. In any event, the court confirmed that the town would be able to apply such non-exclusionary site plan regulations to the area beyond the 51 acres, but that ruling may be moot if the town is ultimately able to prohibit the expansion of the landfill into the remaining acreage under its 1992 zoning amendment.

WETLANDS PERMIT FROM NHDES MAY NOT SATISFY LOCAL REGULATIONS

Cherry v. Town of Hampton Falls, 150 N.H. 720 (2004)

Mr. & Mrs. Cherry submitted an application to subdivide some 84 acres of land into 19 lots. The proposal included the construction of a paved road which would require the filling of about 10,500 square feet of wetlands. As required under the Hampton Falls Zoning Ordinance, the applicants applied to the planning board for a special use permit to fill the wetlands - the "Wetlands Conservation District" in the ordinance applied to wetlands, and to land within 100 feet of the District (the wetlands buffer area).

The zoning ordinance requires that to secure a special use permit for the paved road the applicants had the burden to show that "No alternative route which does not cross a wetland or has less detrimental impact on the wetland is feasible."

At the planning board's public hearing, the engineer for the applicants testified that a safe road could not be designed that could both avoid wetlands impact and serve the needs of the proposed subdivision. The engineer went on to propose an alternative road design that did reduce the impact on the wetlands, but the applicants' environmental expert stated that this alternative design caused increased safety concerns.

The chair of the conservation commission testified that the applicants could design an alternate road with reduced impact on the wetlands and the wetlands buffer, although it would result in fewer than the proposed 19 house lots. A member of the

planning board agreed that a road with reduced wetlands impact appeared to be a possibility and that the applicants needed to address that issue. When asked by the planning board vice-chairman if there was a safe alternative that would have a reduced impact on the wetlands and the wetlands buffer, the applicants' environmental expert stated that he had only analyzed direct wetlands impact and had not had an opportunity to analyze other designs.

At the end of the hearing, **the planning board requested that the plaintiffs submit a road design that addressed the impact upon the wetlands buffer and options to minimize the adverse impact**. The applicants declined the planning board's request because they believed that the plan they presented represented the most viable option. The planning board then voted to deny the application for the special use permit because it failed to address the extent of impact in the wetlands buffer areas, and because the applicants failed to show that there was no feasible alternative as required under the ordinance. The applicants appealed to the superior court, which ruled that the based on the evidence that was before it, the planning board's denial was unlawful because although the applicants' plan had to be reasonable, there was "no requirement under the law that it be perfect." The court based its decision, in part, on a permit issued by NHDES Wetlands Board, which the court found was further evidence that the applicants' overall subdivision plan was reasonable.

On appeal, the supreme court noted the familiar rule that the trial court is not allowed to substitute its judgment for that of the local land use board, and that if any of the board's reasons for the denial of an application support its decision, the decision must be upheld by the court. Based on the record, the supreme court ruled that the applicants failed to make the showing required by the ordinance that the proposed road would minimize impact on the wetlands buffer and that no feasible alternative design would have a less detrimental impact. The applicants failed to make this showing because their expert conceded that he had not analyzed the impact of the proposed road on the wetlands buffer.

Finally, the supreme court ruled that the issuance of the wetlands permit by NHDES did not settle the question of whether the applicants had satisfied the requirements of the zoning ordinance, noting that the trial court was correct in stating that municipalities are allowed to adopt more restrictive regulations for wetlands that those required under State law.

PRACTICE POINTER: One of the places that I think the planning board could have gone wrong, but instead did exactly the right thing, is in its reaction to the expert's admission that he had only analyzed direct wetlands impact and had not had an opportunity to analyze other designs. At that point, any planning board might be tempted to say "Fine. Application denied!" However, as we see in the cases reported earlier in these materials under the heading "Site Plan Review; Assistance to Applicants," local land use boards do have an obligation to assist applicants, not merely seize on imperfections or mistakes in applications as a way to deny them. In this

Cherry case, the Hampton Falls Planning Board did exactly the right thing: it requested that the applicants submit a revised road design that would address the impact on the wetlands buffer and options to minimize adverse impact. Once the applicants chose to decline that invitation, the planning board was well within its rights, and indeed had no choice, but to deny the application.

TOWNS MAY REGULATE THE USE OF SLUDGE UNDER FEDERAL & STATE LAW

Thayer v. Town of Tilton (November 30, 2004)

In a nutshell, the town adopted an ordinance regulation the use of sludge in the town, limiting the use to Class A sludge. The plaintiff had a contract with a division of Wheelabrator Clean Water Systems to stockpile and spread Class B municipal sewage waste biosolids (sludge) on his property, and was notified by DES that a site permit from the State was not needed for the project, although there were some issues that needed to be addressed before the project could move forward. Mr. Thayer subsequently sued the town to have the restriction to Class A sludge declared unlawful, claiming, in part, that the regulation of sludge was preempted under Federal and State laws.

The question of Federal and State preemption was not addressed by he superior court, which denied the plaintiff's challenge on other grounds. However, on appeal, the NH Supreme Court did address the question of preemption, and declared that neither Federal nor State laws prevent towns from adopting their own regulations governing sludge, at least to the extent that such regulations do not conflict with the DES sludge management rules. The court found that there is no "direct conflict" between Tilton's and the State's regulations, and that the Tilton regulations do not "run counter to the legislative intent underlying the statutory scheme." Therefore, Tilton's sludge regulations are not preempted by State of Federal laws or regulations.

MISCELLANEOUS

ONLY AN UNCONSTITUTIONAL LAND USE ORDINANCE WILL LEAD TO AN AWARD OF MONEY DAMAGES FOR A "TAKING"

Torromeo v. Town of Fremont and MDR Corp. v. Town of Fremont, 148 N.H. 640 (2002)

These two cases eventually became joined at the hip, but started out life as separate challenges to the Town of Fremont's growth control ordinance. Torromeo is the developer of a twenty-seven lot residential subdivision know as Mason's Corner. After all but five lots were sold, the town stopped issuing building permits under its newly enacted growth control ordinance. Torromeo and a prospective purchaser of lots sued the town, seeking to require it to issue a building permit to the buyer. The trial court ruled that the subdivision was exempt from the growth control ordinance under the "grandfathering" provisions of RSA 674:39 and ordered the town to issue the building permit.

MDR is the developer of a fourteen lot subdivision and was originally issued five building permits, but was later informed that under the growth control ordinance no more permits could be issued for quite some time. MDR also sued the town, arguing that the growth control ordinance was invalid because the town had never legally adopted a capital improvement program (CIP), which is a prerequisite to the adoption of a growth control ordinance under RSA 674:22. The trial court agreed that the town had never validly adopted the growth control ordinance, and the supreme court had upheld that ruling in an earlier case.

Following their successful attacks on the town's growth control ordinance, Torromeo and MDR filed separate lawsuits against the town seeking money damages caused by the "temporary taking" of their property from the time building permits had been denied under the invalid growth control ordinance until the permits were finally issued. The town argued that money damages for a temporary taking could only be awarded if the plaintiffs had shown that the growth control ordinance was unconstitutional, not merely unenforceable. After some confusing legal maneuvers, the superior court agreed with the plaintiffs and awarded them a substantial amount of money damages.

The town appealed to the supreme court, which reversed the award of money damages. The court clarified some language in an earlier case by ruling that money damages are only available to a plaintiff where the ordinance at issue is found to be unconstitutional and constitutes a taking (temporary or permanent) of the plaintiff's property. If the ordinance is merely invalid for some reason other than unconstitutionality, and thus unenforceable, as was Fremont's growth control ordinance, the only remedy the successful landowner is entitled to is an order forcing the town to issue the building permits that were erroneously denied .

ZBA CANNOT GRANT A SPECIAL EXCEPTION IN THE HOPE THAT THE PLANNING BOARD WILL CLEAN UP THE MESS!!

Tidd v. Town of Alton, 148 N.H. 424 (2002)

The Holts own a forty-four acre tract of land located in a rural zoning district along County Road in Alton. After denying two previous applications, the ZBA approved a third application for a special exception to allow the Holts to develop a campground on the property with 100 campsites, and the angry abutters appealed. The superior court reversed the ZBA's approval and the supreme court agreed with that result.

In order to grant a special exception under the Alton Zoning Ordinance, the ZBA was required to find that the applicant meets several conditions including the following two:

There is no undue nuisance or serious hazard to pedestrian or vehicular traffic, including the location and design of access ways and off-street parking.

The proposed use or structure is consistent with the spirit of this ordinance and the intent of the Master Plan.

The supreme court repeated the rule that in considering whether to grant a special exception, zoning boards may not vary or waive any of the requirements set forth in the zoning ordinance – also, there must be sufficient evidence before the ZBA to support favorable findings on all of those requirements.

In this case, the record showed that the ZBA received testimony that the proposed campground would create serious traffic hazards that could only be resolved if the planning board and/or the NHDOT acted by taking land, redesigning the intersection and pruning some trees and brush. Because of these unresolved traffic hazards, the superior court also concluded that the plan would not promote the public health, safety and general welfare as required by the zoning ordinance, and thus would not be consistent with the spirit of the ordinance.

The supreme court agreed, holding that "by granting the special exception in the face of serious traffic hazards, the ZBA unlawfully waived or varied the conditions [for special exception] of the zoning ordinance."

TOWN MAY APPLY GROWTH CONTROL ORDINANCE UNLESS IMPACT FEES ALREADY PAID OR ASSESSED

Monahan-Fortin Properties, LLC v. Town of Hudson
148 N.H. 769 (2002)

This case involves the court's interpretation of RSA 674:21, V(h) which states:

> "The adoption of a growth management limitation or moratorium by a municipality shall not affect any development with respect to which an impact fee has been paid or assessed as part of the approval for that development." (emphasis added.)

The developer/plaintiff sought approval to construct a 101-unit elderly housing condominium known as Riverwalk along the Merrimack River in Hudson. When the developer filed its site plan application the town already had an impact fee ordinance in place, but there was a dispute about whether the application would be exempt from a newly proposed growth management ordinance. Although the developer and the town battled about whether the site plan should have been (or was in fact) formally accepted by the planning board as complete before the first public notice of the growth management ordinance was published, the superior court ruled that the development was exempt from the growth control ordinance under the above quoted statute because impact fees "would inevitably be assessed or had, in fact, been assessed against the plaintiff." This point was the only issue appealed to the supreme court, and based on the plain language of the statute it disagreed with the lower court.

The record was clear that the developer had not actually paid an impact fee, so it couldn't fit into that part of the statute. However, in its site plan application the developer stated the specific amount of the impact fees it would have to pay under the town's ordinance, and the town acknowledged that it had preliminarily calculated the amount of the impact fees that were to be charged to the project. The superior court held that the statute was satisfied because it seemed "inevitable" that the developer would end up having to pay the impact fee, and therefore concluded that an impact fee had been "assessed." As a result, it ruled that the town could not also apply its growth control ordinance to the project.

The supreme court disagreed, although it declined to precisely define the meaning of "assessed" in this context. Instead, the court said that it was sufficient to state that

> "a preliminary estimate of an impact fee by a municipality does not constitute an assessment within the meaning of the statute, and that a municipality does not assess fees implicitly by merely receiving an application wherein fees are represented."

Instead, the supreme court said the plain language of the statute should have been followed by the superior court: since an impact fee had not already been paid or assessed (past tense) when the growth control ordinance came along, the town could apply both impact fees and growth control restrictions to the development.

DO NOT FORGET TO CERTIFY SUBDIVISION AMENDMENTS AND FILE THEM WITH THE TOWN CLERK!! -- IN THIS CASE, THE APPLICATION SHOULD HAVE BEEN ACCEPTED BY PLANNING BOARD, EVEN THOUGH THE APPLICATION DIDN'T COMPLY WITH THE NEW SUBDIVISION RULE

Rallis v. Town of Hampton Planning Board, 146 N.H. 18 (2001)

Mr. Rallis proposed a six-lot subdivision that included a road which abutted two lots in an adjoining subdivision that already had frontage on an existing road. The proposed design therefore created two "double-fronted" lots, i.e., lots abutted by roads at the front and rear property lines. After several contacts with the planning board and the town's circuit rider planner about the content of his subdivision application, Mr. Rallis submitted the application and filing fee to the planning board on **September 16, 1997**.

Earlier, on **September 4**, the planning board had posted notice of a public hearing for a proposed amendment to the subdivision regulations that prohibited subdivision roads that created double-fronted lots like the two in Mr. Rallis's application. The same notice of public hearing was published in the newspaper on **September 5**.

At the public hearing on **September 17** the planning board voted to approve the amendment, but it did not certify the amendment until **October 1** and did not file the required certification with the town clerk (see RSA 675:6, III) until **October 2**.

At its hearing on **October 1**, the planning board voted not to accept jurisdiction of the subdivision application because it:

(1) did not include written waiver requests for the double-fronted lots; and

(2) presented too many design issues "which ultimately could be reconfigured and submitted at a later date."

Mr. Rallis appealed to superior court, which ruled that the planning board should have accepted the application. The town appealed, and the supreme court agreed with the superior court.

Subdivision Amendment Not Effective Until it Is Certified And Filed With Town Clerk

On appeal, the town first argued that the subdivision amendment became effective on **September 4** or **September 5**, the date of the first published notice, under the provisions of RSA 676:12, I, V. Because the application submitted on **September 16** contained plans for double-fronted lots in violation of the amendment, the planning board argued that it properly declined to accept jurisdiction. The supreme court disagreed, pointing out that under RSA 675:6, III the amendment did not legally become effective until it was certified by the planning board and filed with the town clerk. Thus, the supreme court drew a distinction between the effect of the two statutes, and a corresponding distinction "between a planning board taking jurisdiction over an application, which is at issue here, and formal consideration of an application after accepting jurisdiction." (emphasis added.)

In other words, the supreme court agreed that Mr. Rallis's application was subject to the new amendment, because the application was not formally accepted by the planning board prior to the first legal notice of the amendment. However, the court said that RSA 676:12, V cannot be relied upon by the planning board to deny jurisdiction over the application, since the application had not taken legal effect when the board voted to decline jurisdiction.

PRACTICE POINTER: I think the most important issue to be highlighted in this case is the fact that neither the subdivision regulations themselves nor any amendment to them are legally effective until a copy has been certified by a majority of the planning board and filed with the town clerk as required under RSA 675:6, III. (Note: The same statute also applies to site plan regulations, so the same rules apply to the site plan process!)

That is not a mere request, it is a fundamental requirement that might well determine the outcome of litigation over the denial of a subdivision application and leave a town, at least temporarily, without any enforceable subdivision regulations at all!! It is worth checking with your town clerk to see if the regulations and any amendments have

been properly certified and filed. If the town clerk can't find them, you best assume it hasn't been done and touch base with your town counsel about what action to take!!

Offer to Revise Subdivision Plan Does Not Make it Incomplete

The town also argued that the applicant's offer to revise or redesign the plan to satisfy various planning board concerns, after submitting the application, rendered the application "incomplete." The supreme court disagreed.

Under RSA 676:4, I(b) a "completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision." The court pointed out that the plaintiff's application included detailed subdivision plans and the other items required by the subdivision regulations. Thus, the court ruled, the application was sufficiently complete for the board to exercise jurisdiction over it; the fact that the plan might be revised as it went through public hearing and planning board review does not render it "incomplete" at the time it is submitted for formal acceptance.

PRACTICE POINTER: Understandably, planning boards sometimes get frustrated with the changes that must be made to a subdivision plan to get it to the point where the legitimate planning concerns are addressed; we sometimes hear comments like: "We're not here to design your project for you!!" I think this case stands for the notion that within very broad limits, it is the job of the planning board to work with applicants to make the changes that are needed to eliminate planning concerns. The fact that the proposal is not perfect when it comes in the door is not grounds to refuse to accept it, or refuse to work the plan through the process.

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